11/1/01

(1)

No. 01-769

IN THE

Supreme Court of the United States

EDWARD R. DONNELLY, Superintendent of
Wende Correctional Facility,

Petitioner,

—against—

JEHAN ABDUR RAHEEM, formerly known as
John Whitaker,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
ANN BORDLEY
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

**Counsel of Record for the Petitioner*

November 1, 2001

155pp

QUESTIONS PRESENTED

1. Whether, in a federal habeas corpus proceeding, a state prisoner is constitutionally entitled to rely on testimony introduced at trial as a basis to challenge the propriety of a pretrial ruling denying a motion to suppress evidence, where the prisoner never asked the trial court to reconsider the pretrial suppression ruling in light of the testimony at the trial.

2. Whether, in reviewing a state court's pretrial ruling denying a motion to suppress evidence, the Second Circuit erred by disregarding the deferential standard of habeas corpus review set forth in 28 U.S.C. § 2254(d); and whether, in light of that standard, the Second Circuit erred by overturning the state court's pretrial suppression ruling.

PARTIES TO THE PROCEEDING

The petitioner in this Court is Edward R. Donnelly, the Superintendent of Wende Correctional Facility, which is the state prison where Jehan Abdur Raheem is incarcerated; Mr. Donnelly is substituted for Walter R. Kelly, who was the respondent in the lower courts and was the superintendent of the prison at which Mr. Raheem was previously incarcerated. Mr. Donnelly is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent in this Court is Jehan Abdur Raheem, formerly known as John Whitaker, who was convicted of murder, robbery, and weapon possession in the New York state courts and filed the federal habeas corpus petition that is the subject of this litigation.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Introduction	3
The Motion to Suppress Identification Testimony	4
The First Trial and Appeal	6
The Second Trial and Appeal	7
The Federal Court Proceedings	8

PAGE

REASONS FOR GRANTING THE WRIT 11

I. The Second Circuit's Decision Contributes to a Conflict Among the Federal Courts of Appeals, and Conflicts with Decisions of State Courts of Last Resort, as to Whether a Criminal Defendant Is Constitutionally Entitled to Rely on Trial Testimony to Attack a Pretrial Ruling Denying a Motion to Suppress Evidence. 11

II. The Second Circuit's Decision Presents a Significant, Recurring, and Unresolved Question as to Whether a Criminal Defendant Is Constitutionally Entitled to Rely on Trial Testimony to Attack a Pretrial Ruling Denying a Motion to Suppress Evidence. 15

III. The Second Circuit Erred by Failing to Apply the Deferential Standard of Review Required by the Federal Habeas Corpus Statute to the State Court's Determination that the Identification Testimony Was Reliable and Admissible. 19

CONCLUSION..... 25

PAGE

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit, July 13, 2001 ..... 1a

Opinion of the United States District Court for the Eastern District of New York, April 28, 2000 ..... 41a

Supplemental Opinion of the United States District Court for the Eastern District of New York, June 5, 2000 ..... 91a

Opinion of the Appellate Division of the New York Supreme Court, Second Judicial Department, June 9, 1980 ..... 95a

Opinion of the Appellate Division of the New York Supreme Court, Second Judicial Department, October 31, 1983 ..... 114a

Opinion of the New York Court of Appeals, February 14, 1985 ..... 116a

TABLE OF AUTHORITIES

Cases: PAGES

Abdur-Raheem v. Kelly, 98 F. Supp. 2d 295 (E.D.N.Y. 2000), *rev'd*, 257 F.3d 122 (2d Cir. 2001) ..... *passim*

Commonwealth v. Grandison, 433 Mass. 135, 741 N.E.2d 25 (2001) 14

Estelle v. McGuire, 502 U.S. 62 (1991) 13

Government of Virgin Islands v. Hernandez, 508 F.2d 712 (3d Cir.), *cert. denied*, 422 U.S. 1043 (1975) 12

Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973) 12, 13

In re Tariq A-R Y, 347 Md. 484, 701 A.2d 691 (1997), *cert. denied*, 522 U.S. 1140 (1998) 14

Johnson v. State, 325 Ark. 197, 926 S.W.2d 837 (1996) 13, 14

Lindh v. Murphy, 521 U.S. 320 (1997) 20

Manson v. Brathwaite, 432 U.S. 98 (1977) 9, 21, 23

Neil v. Biggers, 409 U.S. 188 (1972) 9, 10, 21

People v. Gold, 249 A.D.2d 414, 670 N.Y.S.2d 789 (App. Div. 1998) 14

People v. Gonzalez, 55 N.Y.2d 720, 431 N.E.2d 630, 447 N.Y.S.2d 145 (1981), *cert. denied*, 456 U.S. 1010 (1982) 14

PAGES

People v. Kaigler, 368 Mich. 281, 118 N.W.2d 406 (1962) 14

People v. Webb, 6 Cal. 4th 494, 862 P.2d 779, 24 Cal. Rptr. 2d 779 (1993), *cert. denied*, 513 U.S. 839 (1994) 13, 14

People v. Whitaker, 75 A.D.2d 111, 428 N.Y.S.2d 691 (App. Div. 1980) 1, 7, 19

People v. Whitaker, 97 A.D.2d 555, 468 N.Y.S.2d 168 (App. Div. 1983) 1, 8

People v. Whitaker, 64 N.Y.2d 347, 476 N.E.2d 294, 486 N.Y.S.2d 895, *cert. denied*, 474 U.S. 830 (1985) 1, 8

Raheem v. Kelly, 257 F.3d 122 (2d Cir. 2001) ..... *passim*

State v. Lombardi, 727 A.2d 670 (R.I. 1999) 14

United States v. Duguay, 93 F.3d 346 (7th Cir. 1996) 13

United States v. Hicks, 978 F.2d 722 (D.C. Cir. 1992) 12

United States v. Masse, 816 F.2d 805 (1st Cir. 1987) 12, 16

United States v. McRae, 156 F.3d 708 (6th Cir. 1998) 12

United States v. Parra, 2 F.3d 1058 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993) 12, 16

United States v. Smith, 80 F.3d 215 (7th Cir. 1996) 12, 13

PAGES

Victor v. Nebraska, 511 U.S. 1 (1994) 13

Williams v. Taylor, 529 U.S. 362 (2000) 20

Wilson v. Mitchell, 250 F.3d 388 (6th Cir. 2001) 21

United States Constitution:

Fourteenth Amendment 2

United States Statutes:

28 U.S.C. § 1254 2

28 U.S.C. § 2254 ..... 2, 4, 10, 13, 20

New York Statute:

N.Y. Crim. Proc. Law § 470.15 7

Other Authority:

Wayne R. LaFave, *Search and Seizure* (3d ed. 1996) 17

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edward R. Donnelly, Superintendent of Wende Correctional Facility in New York, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Eastern District of New York (Korman, C.J.), and remanded this case to that court for entry of a judgment granting Jehan Abdur Raheem's petition for a writ of habeas corpus, ordering that the convictions that were the subject of that habeas petition be vacated, and ordering that the charges against Raheem be dismissed unless the State affords him a new trial within 120 days. The United States District Court for the Eastern District of New York had denied the petition for a writ of habeas corpus.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 257 F.3d 122 (2d Cir. 2001). The opinion of the United States District Court for the Eastern District of New York is reported at 98 F. Supp. 2d 295 (E.D.N.Y. 2000). The opinion of the Appellate Division on Raheem's first appeal is reported at 75 A.D.2d 111, 428 N.Y.S.2d 691 (App. Div. 2d Dep't 1980). The opinion of the Appellate Division on Raheem's second appeal is reported at 97 A.D.2d 555, 468 N.Y.S.2d 168 (App. Div. 2d Dep't 1983). The opinion of the New York Court of Appeals is reported at 64 N.Y.2d 347, 476 N.E.2d 294, 486 N.Y.S.2d 895 (1985). Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 2001. This petition for certiorari was filed within the time specified by the order dated October 2, 2001 of the Honorable Ruth Bader Ginsburg, Associate Justice of this Court, which extended the time for filing the petition to and including November 1, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;
>
> . . . .

28 United States Code § 2254:

> **State custody; remedies in Federal courts**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

The defendant, Jehan Abdur Raheem (who was formerly known as John Whitaker), was twice tried and convicted before a jury for fatally shooting Charles Hill in the head during the robbery of a bar in Brooklyn, New York on January 4, 1976. At each trial, two witnesses to the shooting—Vincent Cooke and Arthur Shiloh—each testified that, on January 24, 1976, he had identified the defendant from a lineup as the man who shot Hill, and each identified the defendant in court. At the first trial, the State also introduced evidence that the defendant confessed to a detective that he had shot Hill; but a state appellate court subsequently held that the confession was inadmissible under state law, and consequently the confession was not introduced at the second trial.

The New York state courts and the federal district court rejected the defendant's constitutional challenge to the admissibility of the identification testimony of Cooke and Shiloh, but the Second Circuit concluded that the identification testimony was unreliable and therefore constitutionally inadmissible. The questions presented by this case concern the proper standard of review, in a federal habeas corpus proceeding brought pursuant to

28 U.S.C. § 2254, of a state court's determination that identification testimony satisfies the constitutional requirement of reliability. In particular, the questions are whether the Second Circuit erred by relying on testimony elicited at the defendant's trials as a b sis to overturn the state court's ruling, after a pretrial hearing, denying suppression of the identification evidence; and whether, in addition, the Second Circuit erred by failing to apply to that state court determination the deferential standard of review required by the federal habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

The Motion to Suppress Identification Testimony

The defendant moved to suppress the identification testimony of both Cooke and Shiloh, arguing, among other grounds, that the lineup was impermissibly suggestive. In January 1977, Cooke, Shiloh, and the detective assigned to the case, Anthony Martin, testified at the pretrial hearing on the defendant's motion to suppress identification testimony.

The hearing testimony showed that, on the evening of January 4, 1976, Cooke and Shiloh were watching a football game in a neighborhood bar. At about 6:00 p.m., three men, who were strangers to Cooke and Shiloh, entered the bar. One of those men stood by the window next to the entrance. The other two—one of whom Cooke and Shiloh each later identified as the defendant—walked past Cooke and Shiloh, and went into the bathroom at the rear of the bar. Those two men subsequently returned from the bathroom and approached the bar, where the defendant struck up a conversation with Charles Hill, who was one of the owners of the bar. Ten to thirty minutes after the three men had arrived, a shot rang out. Cooke and Shiloh turned and saw Hill fall to

the floor. The defendant was standing immediately behind Hill, and Cooke saw a gun in the defendant's hand. One of the two other men who had arrived with the defendant displayed a gun, announced a "stickup," and took money and jewelry from Cooke and Shiloh. The third man, who had been standing by the window, emptied the cash register. The defendant took money and car keys from another patron, Winfred Moore. The other gunman directed all of the patrons and the barmaid into the bathroom at gunpoint. After the patrons and the barmaid went into the bathroom, the defendant came to the bathroom door and asked which key fit the car. When the patrons and the barmaid emerged from the bathroom after ten to fifteen minutes, the robbers were gone.

The police subsequently received information that Hill's killer was a man named Lindsey Webb. On January 24, 1976, twenty days after the shooting, the police brought Webb to the stationhouse, and Detective Martin began to arrange a lineup. The detective attempted to find five police officers who were similar in appearance to Webb to stand in the lineup, but only three such officers were available. At the time, the defendant was in custody at the same police station for an unrelated murder of a woman named Harriet Gathers. The defendant was not a suspect in the murder of Charles Hill. The defendant was placed in the lineup as an additional participant for the purpose of conducting a fair lineup regarding Webb. Another person who was in custody at the police station was also placed in the lineup.

The barmaid, Shiloh, and Cooke separately viewed the lineup. The barmaid viewed the lineup first and did not identify anyone. Next, Shiloh viewed the lineup and also did not identify anyone. Cooke then viewed the lineup and identified the defendant. When Detective Martin accompanied Cooke back to the waiting room, Shiloh

asked if he could view the lineup again. Shiloh viewed the lineup a second time and identified the defendant. When Shiloh viewed the lineup the second time, he did not know whether anyone else had made an identification.[1]

The evidence at the hearing showed that the defendant was the only participant in the lineup wearing a black leather coat. Both Cooke and Shiloh testified, in essence, that they identified the defendant from the lineup because they recognized his face and also because they recognized the black leather coat.

At the conclusion of the hearing, the court found that the lineup was fair and not unduly suggestive, that Cooke and Shiloh each had ample time to view and notice the defendant at the time of the occurrence, and that none of the defendant's constitutional rights were violated as a result of his appearance in the lineup. The court therefore denied the motion to suppress the identification testimony.

The First Trial and Appeal

At the first trial, in January 1977, Cooke and Shiloh each testified about the lineup identification and also

---

[1] Shiloh and Cooke testified that they did not discuss the lineup with each other at any time before their identifications; the state hearing court credited that testimony; and the Second Circuit accepted that finding, noting that Shiloh and Cooke did not talk about the lineup before Shiloh viewed it a second time (Appendix ["App."] at 7a). 257 F.3d at 127. The district court's contrary assertion—that Shiloh identified the defendant only after learning that another person had identified someone from the lineup (App. at 59a), 98 F. Supp. 2d at 304-05—is totally unsupported by the record.

The Second Circuit, apparently relying on testimony of Shiloh, stated that the barmaid, Cecile Dukes, viewed the lineup after Cooke (App. at 6a-7a). 257 F.3d at 126-27. But Cooke and Detective Martin both testified that Dukes viewed the lineup first, followed by Shiloh and then by Cooke; and the state hearing court and the district court found as much (App. at 45a). 98 F. Supp. 2d at 298.

identified the defendant in court, and a detective testified that the defendant had confessed to him that he had shot Hill. The defendant was convicted of intentional murder, robbery, and weapon possession. On appeal, the New York Supreme Court, Appellate Division, Second Judicial Department, explicitly finding that the defendant had confessed to killing Hill, reversed the conviction and ordered a new trial on the ground that the defendant's statements had been obtained in violation of his right to counsel under the New York State Constitution and therefore should not have been admitted into evidence (Appendix ["App."] at 95a-96a, 97a-98a). *People v. Whitaker*, 75 A.D.2d 111, 112-13, 114, 428 N.Y.S.2d 691, 692, 693 (App. Div. 1980). However, the Appellate Division upheld the denial of suppression of the identification testimony; the Appellate Division, which has fact-finding power, N.Y. Crim. Proc. Law § 470.15(1), found no evidence that the lineup identification procedure was conducted unfairly or that the lineup identification was suggestively induced, and found that, in any event, the in-court identification had a sufficient independent origin (App. at 112a). 75 A.D.2d at 125, 428 N.Y.S.2d at 700.

The Second Trial and Appeal

The defendant was retried in March 1981, before a different judge from the judge who had presided at the suppression hearing and at the first trial. At the second trial, Cooke and Shiloh again each testified about the lineup identification and also identified the defendant in court. The defendant was again convicted of intentional murder, robbery, and weapon possession. In April 1981, the defendant was sentenced to a prison term of twenty-five years to life for the murder, which was ordered to run consecutively to prison terms for the robbery counts, and also to run consecutively to a prison term of twenty-

five years to life that had previously been imposed for a separate murder conviction.

On appeal, the Appellate Division modified the judgment by ordering that the sentences for the convictions in this case all run concurrently to each other, and otherwise affirmed the judgment (App. at 114a-15a). *People v. Whitaker*, 97 A.D.2d 555, 468 N.Y.S.2d 168 (App. Div. 1983).

The New York Court of Appeals affirmed the order of the Appellate Division, rejecting the defendant's claim that placing him in the lineup as a "filler" violated his Fourth Amendment rights (App. at 116a-21a). *People v. Whitaker*, 64 N.Y.2d 347, 352-53, 476 N.E.2d 294, 297, 486 N.Y.S.2d 895, 898 (1985). The New York Court of Appeals noted that the lower court's determination that the lineup was not suggestive involved a mixed question of law and fact and was supported by the record, and was therefore beyond the review of the Court of Appeals (App. at 118a n.*). 64 N.Y.2d at 351 n.*, 476 N.E.2d at 296 n.*, 486 N.Y.S.2d at 897 n.*.

On October 7, 1985, this Court denied the defendant's petition for certiorari. *Whitaker v. New York*, 474 U.S. 830 (1985).

The Federal Court Proceedings

By papers dated July 2, 1996, and filed August 2, 1996, the defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of New York. The defendant claimed that the introduction of the identification testimony of Cooke and Shiloh violated due process, because, according to the defendant, the lineup was impermissibly suggestive and the identifications were not reliable.

By a memorandum and order dated April 28, 2000, the district court denied the petition (App. at 41a-90a).

Abdur-Raheem v. Kelly, 98 F. Supp. 2d 295 (E.D.N.Y. 2000). The district court found that the lineup was suggestive because the defendant was the only person in the lineup who wore a black leather jacket, which Cooke and Shiloh recognized as the one worn by the killer of Hill (App. at 42a). 98 F. Supp. 2d at 297. But the district court concluded that the suggestiveness was inadvertent because the subject of the lineup was not the defendant, and the district court expressly refrained from deciding whether, despite that inadvertence, the lineup was "unnecessarily suggestive," in violation of due process (App. at 42a, 53a-54a, 85a). 98 F. Supp. 2d at 297, 302, 317. Instead, the district court proceeded to determine whether, under the totality of the circumstances, the identifications were reliable even though the lineup was suggestive. In resolving that question, the district court analyzed the five factors enumerated in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), for evaluating the reliability of an identification. The district court concluded that consideration of those five factors alone was insufficient to establish that the identifications were reliable (App. at 54a-59a). 98 F. Supp. 2d at 302-05. However, the district court held that other evidence of the defendant's guilt was also relevant to determining the reliability of the identifications, and that in this case, the other evidence of guilt—principally the defendant's confession, which had been suppressed on state law grounds, but was not obtained in violation of the federal Constitution—established that the identifications were reliable and therefore admissible (App. at 42a-43a, 59a, 83a-84a). 98 F. Supp. 2d at 297, 305, 316.

On July 13, 2001, the United States Court of Appeals for the Second Circuit reversed the judgment and remanded the case to the district court with a direction to grant the petition for a writ of habeas corpus, to vacate

the defendant's convictions, and to dismiss the charges unless the State affords him a new trial within 120 days (App. at 1a-40a). *Raheem v. Kelly*, 257 F.3d 122 (2d Cir. 2001). The Second Circuit held that the appearance of the defendant as the only lineup participant wearing a black leather coat was unnecessarily suggestive as to Cooke and Shiloh (App. at 25a-29a). 257 F.3d at 135-37. In addition, the Second Circuit concluded that the *Neil v. Biggers*f actors did not establish that the identifications were independently reliable (App. at 29a-33a). 257 F.3d at 138-40. The Second Circuit also rejected the argument that corroborative evidence of guilt is relevant to the reliability of an identification (App. at 34a-38a). 257 F.3d at 140-42.

In overturning the state court determinations that the lineup was not suggestive and that the identifications had an independent origin, the Second Circuit made no mention at all of the deferential standard set forth in 28 U.S.C. § 2254(d), as amended by AEDPA, which governs the evaluation of state court rulings on federal habeas review. Furthermore, the Second Circuit repeatedly cited testimony from the defendant's trials to support its conclusion that the state hearing court erred by ruling, prior to trial, that the identification evidence was admissible (App. at 25a-26a, 30a-33a). 257 F.3d at 136, 138-40.

This petition for certiorari challenges the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case presents two separate, important issues of federal law, each of which was resolved incorrectly by the court below. First, the court, in conflict with the holdings of numerous federal and state appellate courts, erred by relying on testimony at the defendant's trials as a basis for overturning the state court's pretrial ruling on his motion to suppress identification evidence. Second, the court below erred by failing to apply the proper standard of deference, required by statute, to the state court's determination of the motion to suppress. Each of these issues warrants the grant of certiorari to review the judgment below.

I. The Second Circuit's Decision Contributes to a Conflict Among the Federal Courts of Appeals, and Conflicts with Decisions of State Courts of Last Resort, as to Whether a Criminal Defendant Is Constitutionally Entitled to Rely on Trial Testimony to Attack a Pretrial Ruling Denying a Motion to Suppress Evidence.

In the decision below, the Second Circuit relied extensively on testimony elicited at the defendant's trials as a basis for overturning the state court's pretrial ruling that the identification evidence was admissible. By doing so in a federal habeas corpus proceeding—in which relief may be granted only for a violation of federal law—the Second Circuit effectively held that a criminal defendant, either on appeal or on federal habeas corpus review, is constitutionally entitled to rely on trial testimony to attack a pretrial suppression ruling.

The Second Circuit's holding adds to an existing conflict among the federal courts of appeals, and also conflicts with the decisions of seven state courts of last resort, on the question of whether a reviewing court is

constitutionally required to consider trial testimony when determining the propriety of a pretrial ruling denying a motion to suppress evidence. These conflicts warrant the grant of certiorari to review the judgment in this case.

The Second Circuit's reliance on trial testimony as a basis for rejecting a pretrial suppression ruling conflicts with the holdings of at least six of the federal courts of appeals. The courts of appeals for the First, Third, Sixth, Seventh, Tenth, and District of Columbia Circuits each have held that a defendant is not entitled to rely on trial testimony to attack a pretrial suppression ruling, in the absence of a request by the defendant at trial for the district court to reconsider the motion to suppress. *United States v. Masse*, 816 F.2d 805, 808-09 (1st Cir. 1987); *Government of Virgin Islands v. Hernandez*, 508 F.2d 712, 714 n.3 (3d Cir.), *cert. denied*, 422 U.S. 1043 (1975); *United States v. McRae*, 156 F.3d 708, 711 (6th Cir. 1998); *United States v. Smith*, 80 F.3d 215, 220 (7th Cir. 1996); *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Hicks*, 978 F.2d 722, 724-25 (D.C. Cir. 1992).

By contrast, the Eighth Circuit, as well as the Second Circuit in this case, have held in habeas corpus proceedings that a federal court may consider trial evidence as a basis to challenge a state court's pretrial suppression ruling. In *Holloway v. Wolff*, 482 F.2d 110 (8th Cir. 1973), the defendant moved to suppress evidence on Fourth Amendment grounds, and the state court, after a pretrial hearing, denied the motion to suppress. On habeas review, the Eighth Circuit relied in part on trial evidence as a basis for overturning the state court's pretrial suppression ruling, and explicitly stated that it could consider trial evidence in determining whether the defendant's constitutional rights had been violated. *Id.* at

113 n.2. Similarly, in the case at bar, the Second Circuit repeatedly relied on testimony from the defendant's trials as a basis for overturning the state court's pretrial suppression ruling (App. at 25a-26a, 30a-33a). 257 F.3d at 136, 138-40.

By relying on trial testimony to overturn a pretrial suppression ruling on federal habeas review, the Eighth Circuit in *Holloway* and the Second Circuit in this case have effectively held that a defendant is constitutionally entitled to rely on trial testimony to attack a pretrial suppression ruling, because federal habeas corpus relief must be predicated on a violation of federal law.[2] *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Thus, the Second Circuit's decision contributes to a conflict on this issue among the federal courts of appeals. This conflict warrants the grant of certiorari to review the decision below.

In addition, the Second Circuit's reliance on trial testimony as a basis for rejecting a pretrial suppression ruling conflicts with the decisions of at least seven state courts of last resort. *Johnson v. State*, 325 Ark. 197, 203 n.1, 926 S.W.2d 837, 840 n.1 (1996); *People v. Webb*, 6

---

[2] When, on direct appeal, a federal court relies on trial testimony to overturn a pretrial suppression ruling, the court may be acting in the exercise of its supervisory power over the district court, and not on the ground that consideration of the trial testimony is constitutionally required. *Compare United States v. Duguay*, 93 F.3d 346, 350, 352, 354 (7th Cir. 1996) (Seventh Circuit relied on trial testimony in overturning pretrial suppression ruling) *with United States v. Smith*, 80 F.3d 215, 220 (7th Cir. 1996) (same court refused to rely on trial evidence to reverse pretrial suppression ruling). By contrast, because the case at bar is a federal habeas corpus proceeding—in which the federal courts have no supervisory authority over the state courts (*see Victor v. Nebraska*, 511 U.S. 1, 17 [1994])—the Second Circuit's reliance on trial testimony as a basis for overturning the pretrial suppression ruling necessarily rests on a holding that consideration of that testimony is constitutionally required.

Cal. 4th 494, 527, 862 P.2d 779, 800, 24 Cal. Rptr. 2d 779, 800 (1993), *cert. denied*, 513 U.S. 839 (1994); *In re Tariq A-R Y*, 347 Md. 484, 488, 701 A.2d 691, 693 (1997), *cert. denied*, 522 U.S. 1140 (1998); *Commonwealth v. Grandison*, 433 Mass. 135, 137, 741 N.E.2d 25, 29-30 (2001); *People v. Kaigler*, 368 Mich. 281, 288, 118 N.W.2d 406, 409 (1962); *People v. Gonzalez*, 55 N.Y.2d 720, 721-22, 431 N.E.2d 630, 630-31, 447 N.Y.S.2d 145, 145-46 (1981), *cert. denied*, 456 U.S. 1010 (1982); *State v. Lombardi*, 727 A.2d 670, 675 n.1 (R.I. 1999). In five of those cases (*Tariq A-R Y*, *Grandison*, *Kaigler*, *Gonzalez*, and *Lombardi*), the court stated the legal principle that, in reviewing a ruling on a motion to suppress evidence, an appellate court may not consider evidence introduced at the trial. In the other two cases (*Johnson* and *Webb*), the court rejected an attempt by the defendant to use trial testimony to challenge a suppression ruling.

Moreover, because the Second Circuit's decision in this case conflicts with the holding of the New York state appellate courts that they may not consider trial evidence in reviewing the denial of a pretrial suppression motion, the Second Circuit's decision has the paradoxical effect of allowing a federal court to overturn a state court's pretrial suppression ruling on a ground that, according to New York precedent, the state appellate courts were barred from considering. *See, e.g.*, *People v. Gonzalez*, 55 N.Y.2d at 721-22, 431 N.E.2d at 630-31, 447 N.Y.S.2d at 145-46 (propriety of denial of suppression motion must be judged on the evidence before the suppression court); *People v. Gold*, 249 A.D.2d 414, 415, 670 N.Y.S.2d 789 (App. Div. 1998) (applying "well settled" rule that defendant who does not move to reopen suppression hearing may not rely on trial testimony to challenge suppression ruling).

Thus, on the issue of whether a defendant is constitutionally entitled to rely on trial testimony to challenge a pretrial suppression ruling, the decision below is consistent with the holding of the Eighth Circuit, but conflicts with the holdings of six other federal courts of appeals and with the decisions of seven state courts of last resort. Certiorari should be granted to review the judgment below and to resolve both of these conflicts.

II. The Second Circuit's Decision Presents a Significant, Recurring, and Unresolved Question as to Whether a Criminal Defendant Is Constitutionally Entitled to Rely on Trial Testimony to Attack a Pretrial Ruling Denying a Motion to Suppress Evidence.

The state trial court in this case conducted a pretrial hearing on the defendant's motion to suppress the identification testimony of two eyewitnesses. At that hearing, both of those witnesses—Cooke and Shiloh—testified at length about the circumstances of their observations at the time of the shooting, and those witnesses, as well as a police detective, testified about the lineup procedure at which Cooke and Shiloh each identified the defendant. At the conclusion of the hearing, the trial court rejected the defendant's constitutional challenge to the admissibility of the identification testimony, explicitly finding that Cooke and Shiloh each had ample time to view the defendant at the time of the crime. On federal habeas corpus review, the court below overturned that pretrial suppression ruling, relying in substantial part on testimony that was elicited at a trial held more than four years after the suppression hearing. This case presents an important and recurring constitutional issue concerning the entitlement of a criminal defendant, either on appeal or on federal habeas review, to rely on trial testi :ony as a basis for attacking a pretrial suppression ruling.

Certiorari should be granted because this issue potentially arises in every case in which a motion to suppress evidence is denied after a pretrial hearing, the defendant is tried and convicted, and the defendant, either on appeal or on federal habeas corpus review, challenges the denial of the motion to suppress. Moreover, the issue can arise regardless of the substantive constitutional ground on which the defendant sought to suppress evidence. Thus, in this case, the question whether the defendant is constitutionally entitled to rely on trial testimony to attack a pretrial suppression ruling arises on federal habeas review of a motion to suppress identification evidence on due process grounds; but the same question can also arise on direct appeal from a conviction, and it can arise in cases in which the defendant moved to suppress evidence on other constitutional grounds. *E.g.*, *United States v. Parra*, 2 F.3d 1058, 1063-67 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993) (review on direct appeal of motion to suppress physical evidence on Fourth Amendment grounds); *United States v. Masse*, 816 F.2d 805, 808-09 (1st Cir. 1987) (review on direct appeal of motion to suppress statements on the basis of alleged *Miranda* violation).

The Second Circuit's resolution of this issue is unreasonable, and fails to accord appropriate deference to the determination of the court that decided the motion to suppress. By relying on trial testimony to overturn a pretrial suppression ruling, a reviewing court effectively second-guesses the propriety of the suppression ruling on the basis of facts that were not before the suppression court at the time of its ruling. When, as in this case, the defendant does not ask the trial court to reconsider its pretrial suppression ruling in light of evidence introduced at trial, the court should not, during the trial, have to reconsider the pretrial suppression ruling *sua sponte*. *See United States v. Parra*, 2 F.3d at 1065. Moreover, in

the absence of any request by the defendant for the court to reconsider the pretrial ruling on the basis of evidence at the trial, the State has no reason to introduce additional evidence that might have met the defendant's objection arising from the trial evidence, and the trial court has no occasion to make credibility findings regarding the testimony that is allegedly inconsistent with the pretrial ruling. Consequently, if a reviewing court relies on trial testimony as a basis for overturning a pretrial suppression ruling, then the reviewing court may be in the untenable position of accepting as true certain testimony "which conceivably neither the trial judge nor the jury believed or which neither judge nor jury had any reason to assess." *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.7(d), at 417-18 (3d ed. 1996) (footnote omitted).

The circumstances of this case demonstrate persuasively why a defendant cannot be entitled to rely on trial testimony to challenge a pretrial suppression ruling. The defendant's second trial was held more than four years after the court issued its pretrial ruling on the motion to suppress. In addition, the judge who presided at the second trial was different from the judge who had presided at the pretrial hearing and had decided the motion to suppress. The defendant never asked the court, at either of the trials, to reconsider the pretrial suppression ruling on the basis of any inconsistencies between the testimony at the trial and the testimony at the pretrial hearing. Given that the second trial was conducted over four years after the pretrial hearing, and before a different judge, it would be particularly unreasonable to hold that the judge at the second trial was constitutionally required, *sua sponte*, to identify any inconsistencies between testimony at the trial and testimony at the pretrial hearing, and to reexamine the suppression ruling on the basis of those inconsistencies. Yet the Second Circuit

explicitly cited testimony from the second trial no less than eleven times in support of its conclusion that the state court erred by denying the motion to suppress (App. at 25a-26a, 30a-33a), 257 F.3d at 136, 138-40; and the Second Circuit also placed substantial reliance on the evidence that Cooke and Shiloh misidentified the other gunman from a photographic array, even though that evidence was elicited only at the trials and not at the suppression hearing (App. at 5a, 30a-31a, 33a). 257 F.3d at 126, 138, 139, 140.[3]

Indeed, the Second Circuit even cited the testimony of a witness at the second trial—Winfred Moore—who had not testified at the pretrial hearing. The Second Circuit apparently relied on Moore's trial testimony to cast doubt on Cooke's hearing testimony that Cooke had an additional opportunity to observe the shooter when he came to the door of the bathroom where the bar patrons had been directed (App. at 30a). 257 F.3d at 138. But the state court obviously did not consider Moore's testimony in deciding the motion to suppress, because Moore did not testify at the suppression hearing; and the state court was never called upon to determine the credibility of Moore's testimony at the trial. Moreover, there is little reason to credit Moore's testimony at the trial over Cooke's testimony at the hearing, because Cooke testified at the hearing just one year after the events in question, whereas the testimony of Moore cited by the Second Circuit was elicited more than five years after those events. Thus, this case illustrates the pitfalls of a constitutional rule that would require a reviewing court to consider trial testimony when determining the propriety of a pretrial suppression ruling.

---

[3] The State argued in the court below that a defendant may not rely on trial testimony to challenge a pretrial suppression ruling (*see* State's brief to Second Circuit at 35 n.4).

Ironically, the Second Circuit criticized the district court for relying on events at the trial and the sentencing to uphold the admissibility of the identification testimony, and the Second Circuit characterized those events as "anachronistic" with respect to an analysis of the state trial court's "preliminary ruling on the admissibility of evidence" (App. at 38a). 257 F.3d at 142. But the Second Circuit's reliance on testimony at the trials to overturn the state court's pretrial ruling is subject to precisely the same criticism.

Therefore, the petition for certiorari should be granted so that this Court can decide the significant and recurring question of whether a defendant is constitutionally entitled to rely on trial testimony as a basis for challenging a pretrial suppression ruling.

III. The Second Circuit Erred by Failing to Apply the Deferential Standard of Review Required by the Federal Habeas Corpus Statute to the State Court's Determination that the Identification Testimony Was Reliable and Admissible.

At the conclusion of the pretrial hearing, the state trial court found that the lineup from which Cooke and Shiloh identified the defendant was fair and not unduly suggestive, and that Cooke and Shiloh each had ample time to view the defendant at the time of the crime. The state appellate court likewise found no evidence that the identification of the defendant from the lineup was suggestively induced, and found that, in any event, the in-court identification of the defendant had a sufficient independent origin (App. at 112a). 75 A.D.2d at 125, 428 N.Y.S.2d at 700. In rejecting the determination of the state courts that the identification testimony was admissible, the Second Circuit completely ignored the deferential standard that a federal court is statutorily required

to apply on habeas corpus review of a state court decision.

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court is authorized to grant a writ of habeas corpus to a state prisoner only if the state court decision under review "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). These provisions set forth a "highly deferential standard" for evaluating state court rulings. *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Under the "unreasonable application" clause of section 2254(d)(1), a federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (O'Connor, J., writing for the Court in Part II of her opinion). Rather, the federal court may grant habeas relief only if the state court decision involved an application of clearly established federal law that was "objectively unreasonable." *Id.* at 409.

In the decision below, the Second Circuit failed to apply that statutory standard of review.[4] Indeed, although the State argued in the Second Circuit that review of the state court's decision was governed by that

---

[4] The standard set forth by AEDPA applies to this case because the defendant filed his habeas petition on August 2, 1996, and the AEDPA standard applies to petitions filed after April 24, 1996, the date on which AEDPA was enacted. *See Lindh v. Murphy*, 521 U.S. at 327.

statutory standard (*see* State's brief to Second Circuit at 21-22), the Second Circuit never even referred to that standard anywhere in its opinion. Instead, the Second Circuit reviewed the state court determinations *de novo* and concluded that those determinations were incorrect (App. at 25a-33a). 257 F.3d at 135-40. The Second Circuit thus failed to accord the proper deference to the state courts' determination that the identification testimony was admissible. *See Wilson v. Mitchell*, 250 F.3d 388, 397-99 (6th Cir. 2001) (applying "unreasonable application" standard to state court's determination that identification was reliable).

The evidence at the pretrial suppression hearing provided ample support for the state court finding that the identifications by Cooke and Shiloh were reliable. In *Neil v. Biggers*, 409 U.S. 188 (1972), this Court held that, in determining whether an identification is reliable even if the confrontation procedure was suggestive, the factors to be considered include: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the out-of-court identification procedure, and (5) the length of time between the crime and the out-of-court identification. *Id.* at 199; *see also Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

In this case, the evidence at the hearing showed that both Cooke and Shiloh had a protracted opportunity at the time of the crime to observe the man whom they identified as the defendant. The amount of time that passed from the defendant's arrival in the bar until the shooting was, according to Cooke, ten to twenty minutes, and, according to Shiloh, twenty-five to thirty min-

utes (Cooke: 160, 185, 199; Shiloh: 84, 104).[5] Shiloh observed the defendant and the other two men through the window as they approached the bar (Shiloh: 83, 101-03). Both Cooke and Shiloh observed the three men enter the bar and saw the defendant and one of the men walk by on their way to the bathroom (Cooke: 157, 190-92; Shiloh: 83-84, 108); both witnesses saw the defendant, after he came out of the bathroom, standing at the bar and talking to Hill (Cooke: 158-59, 197-202; Shiloh: 109, 115-16); and both witnesses saw the defendant standing behind Hill immediately after the shot was fired (Cooke: 159-60, 198; Shiloh: 86). Cooke then looked at the defendant as Cooke walked past him on the way to the bathroom, and Cooke again saw him when the defendant came back to the bathroom to ask about the car keys (Cooke: 162, 204). Both witnesses were able to see the defendant's face (Cooke: 185, 191, 195; Shiloh: 115-16).

In addition, Cooke testified that he paid attention to the three men because he did not know them, and Shiloh testified that he looked at them because he was suspicious (Cooke: 156-57, 160, 190-91, 197, 201-02; Shiloh: 109, 116). Both witnesses recounted descriptions that they had given to the police on the night of the shooting regarding the man whom they identified as the defendant: Cooke described that gunman as five feet seven inches or five feet eight inches tall, and wearing a black hat and a black leather coat; and Shiloh described that gunman as twenty-seven to thirty years old, about five feet eight inches tall, and weighing 165 to 170 pounds, and Shiloh also told the police that the gunman was dressed very neatly, had brown skin, and had a black leather coat and a cap (Cooke: 181-82; Shiloh: 130). As

---

[5] Numbers in parentheses refer to pages of the transcript of the suppression hearing.

in *Manson v. Brathwaite*, "[n]o claim has been made that [the defendant] did not possess the physical characteristics so described." 432 U.S. at 115. At the time of the lineup identification, when Detective Martin asked how sure Cooke was of his identification, Cooke replied, "[I]f it isn't him, it's nobody" (Martin: 220). After Shiloh initially viewed the lineup and did not identify anyone, he asked to view the lineup again because, when he visualized everything from the night of the shooting, one of the men in the lineup kept coming up in his mind (Shiloh: 90, 139, 145-46). On cross-examination at the hearing, Shiloh was asked if there was any doubt in his mind, when he viewed the lineup the second time, that the defendant was the man he saw in the bar. Although Shiloh acknowledged that "[e]veryone have a little doubt" and that he was "[n]ot positive," Shiloh testified that, at the time of the lineup, he identified the defendant because "that was the man" (Shiloh: 147). Finally, only twenty days elapsed between the crime and the lineup identifications.

Thus, the totality of the circumstances supports the state court determination that the identifications were reliable. Indeed, the Second Circuit acknowledged that the witnesses' opportunity to view the shooter "seems to favor reliability" (App. at 30a), 257 F.3d at 138, and that the time between the crime and the lineup was not great (App. at 33a). 257 F.3d at 139.

In rejecting the finding of reliability, the Second Circuit repeatedly referred to the witnesses' "inability to describe any features of the shooter's face" (App. at 33a, 31a-33a). 257 F.3d at 140, 138-39. But in fact Cooke testified that he remembered the defendant's eyes because they were "different" and there was something about them that "stood out," which Cooke described as a "glare" or "how he fixed his eyes" (Cooke: 185-86; *see* App. at 5a, 257 F.3d at 126). Moreover, a witness cannot

be expected to describe facial features with the precision of a portrait artist. In addition, the Second Circuit noted that Cooke and Shiloh had misidentified the other gunman from a photographic array (App. at 5a, 30a-31a, 33a). 257 F.3d at 126, 138, 139, 140. But the evidence of those misidentifications was elicited at the trials, not at the suppression hearing, and therefore is not a proper basis for overturning the pretrial suppression ruling (see pp. 16-19 above). In any event, because those misidentifications were of a different robber and were made from a photograph, they do not undermine the reliability of the corporeal identifications of the defendant. Furthermore, contrary to the Second Circuit's conclusion, the reliability of the identifications of the defendant was not diminished by the fact that both witnesses "repeatedly cited the coat worn by Raheem [the defendant] as influential in their selection of him" (App. at 33a). 257 F.3d at 140. Both witnesses testified that they recognized the defendant's face as well as his coat (Cooke: 165-66, 181, 185; Shiloh: 147-50; *see* App. at 6a-9a, 257 F.3d at 127-28). Given that the witnesses recognized the defendant's face, their ability also to recognize an article of clothing worn by the defendant cannot render their identification of him any less reliable.

Thus, the state court finding that the identifications were reliable did not involve an "unreasonable application" of federal law. Consequently, the Second Circuit's error of relying on trial testimony to second-guess the state court's pretrial suppression ruling was compounded by the Second Circuit's additional error of disregarding the statutory standard that governs habeas corpus review of that state court ruling. On the basis of these errors, the Second Circuit vacated the twenty-year-old murder conviction of a man who confessed to the killing. Certiorari should be granted to correct the Second Circuit's decision and to clarify the proper standard of

deference to which a state court's pretrial suppression ruling is entitled on federal habeas corpus review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
ANN BORDLEY
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

* *Counsel of Record for the Petitioner*

November 1, 2001

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 8, 2001 Decided: July 13, 2001)

Docket No. 00-2304

JEHAN ABDUR RAHEEM, f/k/a John Whitaker,

Petitioner-Appellant,

—v.—

WALTER R. KELLY, Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Before:

KEARSE, JACOBS, and CABRANES,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Chief Judge*, denying petition for habeas corpus, ruling that witness identifications resulting from an unconstitutionally suggestive procedure were admissible

because petitioner's guilt was corroborated by other evidence that was inadmissible or not introduced at trial.

Reversed.

NORMAN R. WILLIAMS II, New York, New York (Mayer, Brown & Platt, New York, New York, on the brief), *for Petitioner-Appellant*.

LEONARD JOBLOVE, Assistant District Attorney, Brooklyn, New York (Charles J. Hynes, District Attorney Kings County, Florence M. Sullivan, Assistant District Attorney, Brooklyn, New York, on the brief), *for Respondent-Appellee*.

KEARSE, *Circuit Judge*:

Petitioner Jehan Abdur Raheem, formerly known as John Whitaker ("Raheem", "Whitaker", or "Whitaker/Raheem"), a New York State ("State") prisoner convicted principally of robbery and murder, appeals from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Chief Judge*, denying his petition pursuant to 28 U.S.C. § 2254 (1994 & Supp. III 1997) for a writ of habeas corpus vacating his convictions on the ground that he was denied due process at trial by the admission of unreliable identification evidence. The district court denied the petition, ruling that, although the identifications were the product of an impermissibly suggestive procedure, their admission was not erroneous because other evi-

dence, although inadmissible or not introduced at trial, corroborated Raheem's guilt and therefore made the identifications reliable. For the reasons that follow, we reverse.

I. BACKGROUND

For purposes of this appeal, many of the facts are undisputed. In January 1976, three men robbed a bar; one of them, described principally as wearing a black leather coat, shot one of the owners. After two trials, Raheem was convicted as the shooter. The following description of the events and the police investigation is taken largely from the record of Raheem's second trial and pretrial hearings on motions to suppress.

A. *The Robbery and Murder*

In the early evening of January 4, 1976, at the Moulin Rouge, a neighborhood bar in Brooklyn, New York, several persons watched a football game on television: the bar's part-owner Charles Hill, the bartender Cecile Dukes, and four patrons, Arthur Shiloh, Vincent Cooke, Winfred Moore, and Sam Hayward. Three strangers entered the bar; one stood near the window at the front; the other two went briefly to the men's room. Upon their return, one approached Hill and engaged him in conversation; the other stood behind Shiloh, Cooke, and Moore, who were chatting while they drank and watched the game.

After about 15 minutes, a shot was heard; Hill fell onto the man who shot him, then onto the floor, dead. The patrons and the bartender had not seen the shooting but turned in time to see Hill fall; Cooke, Moore, Hayward, and Dukes observed a gun in the hand of the stranger standing near Hill. The man standing behind Shiloh, Cooke, and Moore then also brandished a gun

and announced a hold-up. He proceeded to take money, jewelry, and other items from Shiloh and Cooke; the shooter took such items from Hayward and Moore, including Moore's car keys. The robber who had been standing near the front window vaulted the bar and took money from the cash register. The patrons and the bartender were then herded into the men's room and warned not to come out. The robbers fled in Moore's car.

After a few minutes, the survivors left the bathroom and summoned the police.

B. *The Investigation and the Identifications*

The police interviewed the witnesses and obtained descriptions of the robbers. The only testimony by a police officer as to the contents of their descriptions of the shooter, given by Detective Anthony Martin at a *Wade* hearing on a motion to suppress identifications of Raheem by Shiloh and Cooke, *see United States v. Wade*, 388 U.S. 218 (1967), was that a police report "state[d] a three quarter length black coat." (*Wade* Hearing Transcript ("*Wade* Tr."), January 10, 1977, at 233.) However, Shiloh and Cooke, at the *Wade* hearing or at trial, testified to the somewhat fuller descriptions they recalled having given.

Shiloh testified that he told a police detective that the shooter "was dressed very neat, brown skin, had a black leather coat and a cap. That's the best description." (*Wade* Tr. 130.) When the detective asked about height, weight, and age, Shiloh responded that the shooter was about 5'8", 165 or 170 pounds, and perhaps 27-30 years of age. (*See id.*) Shiloh recalled that the shooter did not have a moustache or long sideburns; but he had not noticed anything about the shooter's eyes, other facial features, head shape, or hair length. (*See Wade* Tr. 125-26.)

Cooke testified that the description he had given the police immediately after the shooting was of a man "about five-seven or eight," wearing a "black hat and black leather coat." (*Wade* Tr. 181-82; *see also* Second Trial Transcript ("Second Trial Tr.") 183 (Giving the police "the best [description] that [he] could remember," Cooke had "figured [the shooter] was about five[-]seven. I know he had on a black leather coat and he had on a black cap. That I can remember.").) The shooter was "medium size" and appeared to be in his 20s. (Second Trial Tr. 183-84.) The only facial feature that stood out in Cooke's mind was that the shooter "had weird eyes" (Second Trial Tr. 184), perhaps "a glare or . . . how he fixed his eyes" (*Wade* Tr. 186). As to whether he had described the shooter's eyes to the detective, Cooke stated: "How could you describe his eyes? They were different. That's how I put it, something about it that stood out." (*Id.*) Cooke testified that he did not recall anything physically distinctive about the shooter's mouth or nose; his only description of the shooter's face was that it was round and that his eyes were weird. (*Wade* Tr. 186-88.)

The subsequent investigation by the police took a number of uncommon turns. First, on January 10, six days after the shooting, Cooke and Shiloh were shown a photographic array. They, independently, selected the same photo as the face of the man who, at gunpoint, had taken their cash and jewelry. Further investigation, however, revealed that their identifications could not be correct. At the time of the robbery, the man Cooke and Shiloh chose was in prison.

Next, a police lineup resulted in the identification of a person participating purely by happenstance, rather than the person the police had suspected and placed in the lineup on the basis of confidential information. The police had received a tip from an informant that the

person who killed Hill was one Lindsay Webb. Webb was arrested on January 24 and brought to the 77th Precinct, where Detective Martin arranged to hold a lineup. Martin attempted to include in the lineup five police officers who generally matched Webb's appearance. Only three such officers were available, however. In the meantime, Raheem, who was then known as John Whitaker, had been arrested by Detective Clarence Crabb in connection with an unrelated case, the murder of one Harriet Gathers. Whitaker/Raheem was not a suspect in the Hill slaying. He was in custody at the 77th Precinct on January 24 on the *Gathers* case, and when Martin could not get five police officers who resembled Webb, Martin included Whitaker/Raheem and another arrestee in the lineup. Whitaker/Raheem was wearing a black leather coat.

All five of the witnesses to the robbery/murder were asked to view the lineup. Two did not: Moore had an ailing back; Hayward arrived too late. The lineup was viewed by Shiloh, Cooke, and Dukes. Shiloh, upon first viewing the lineup, was unable to identify anyone. Dukes was never able to make an identification. Cooke made an identification; but, to the surprise of the police officers, he identified Whitaker/Raheem, not Webb, as the man who had shot Hill. At the *Wade* hearing, Cooke testified:

> Well, I looked them all over carefully because[ ]I didn't want to make any mistakes and then I picked number one, the guy. Mr. Whitaker had a sign in his hand that said one and I picked him. *I said he appeared to be the one that I remember in the bar. And I could tell from his, you know—his coat is another thing. He had on a leather coat that I remembered.*

. . . .

Q. When you identified Mr. Whitaker as one of the people who were in the bar, did you do that solely based upon the fact that he was[ ]wearing a black leather coat?

MR. FEDER: Objection, your Honor. Leading.

THE COURT: Objection sustained.

Q. What was the basis for your picking out Mr. Whitaker?

A. His face.

Q. What were you thinking back to when you made the identification?

A. How he looked like the man that I saw in the bar. And *the clothes. You know, he had on the same clothes*. I looked at the round face.

(*Wade* Tr. 165-66 (emphases added).) Whitaker/Raheem was the only person in the lineup wearing a black leather coat.

Shiloh, after viewing the lineup and failing to identify anyone, had remained in a waiting room near the lineup viewing room. He testified that when Cooke returned from the lineup viewing room, Martin took Dukes to view the lineup, and Shiloh and Cooke chatted in the waiting room. They did not talk about the lineup, but when Martin returned with Dukes, Shiloh asked to view the lineup again and was permitted to do so. This time he promptly identified Whitaker/Raheem. At the *Wade* hearing, he testified:

Q. At that time was there any doubt in your mind when you looked through that window the second time that number one was the man that you saw in the bar, was there any doubt?

A. Everybody have a little doubt, but I said that was the man. O.K.

Q. But you weren't absolutely sure?

A. Not positive, but I said that was the man, really, because you see like at the time he was standing there he didn't have the cap on, . . . but face features of him[,] the black leather coat, the same thing, *the black leather coat really set it off for me.*

Q. *That black leather coat was outstanding in your mind*?

A. *Right, because it wasn't no cheap coat.*

Q. *And you remember the black leather coat worn by one of the men in the bar on January 4th*?

A. *Right.*

. . . .

Q. *The fact that John Whitaker was wearing a black leather coat in this lineup and that one of the men in the bar that evening was wearing a black leather coat, you put those two facts together, is that right*?

A. *I am just going by what I saw what he was wearing. That is what I am talking about.*

. . . .

Q. . . . . *Mr. Shiloh, the elements that went through your mind at the time that you asked to make this identification, did you make the identification basically on the facts that the man in the bar on January the 4th was wearing a neat[ ]black leather coat and John Whitaker, number one in the lineup, was wearing a black leather coat*?

A. *Right.*

THE COURT: *Is that the sole basis for your identification?*

THE WITNESS: *Yes.*

THE COURT: *The only basis?*

THE WITNESS: *Yes.*

THE COURT: *Not the face and the features?*

THE WITNESS: *The feature and the face and the black leather jacket.*

THE COURT: What I asked you was it only the black leather coat. If somebody else in that lineup, number 5 let's say was wearing a neat black leather coat, and Whitaker was not wearing a black leather coat, would you have picked him out?

THE WITNESS: Yes. By the face.

THE COURT: Would you have picked him out?

THE WITNESS: Yes.

. . . .

THE COURT: Who would you have picked out?

THE WITNESS: I would have picked out Mr. Whitaker.

THE COURT: You would have picked out number one anyway even if he wasn't wearing a black leather coat?

THE WITNESS: Yes.

(*Wade* Tr. 147-50 (emphasis added).)

After Cooke and Shiloh identified Raheem as Hill's killer, Raheem remained in police custody, but only in the *Gathers* case. For several weeks, he was not accused

of the Hill homicide; and although the police investigation continued, the record does not indicate that it turned up any evidence against Raheem. The final twist in the Hill homicide investigation occurred a month after the lineup, when, according to Detective Crabb, Raheem summoned Crabb and confessed. At a pretrial *Huntley* hearing, *see People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), a proceeding to determine whether a confession should be suppressed, Crabb testified that Raheem had telephoned him and asked to meet with him. Raheem said Crabb had "put [Raheem's] tail in the soup" in the *Gathers* case by extracting from him a statement that subjected him to a charge of felony murder. (*Huntley* Hearing Transcript, January 6, 1977 ("*Huntley* Tr."), at 34.)

On February 23, 1976, Crabb met with Raheem in his cell. Raheem reiterated that Crabb had "put [Raheem's] tail in the soup" (*Huntley* Tr. 51) and began to talk to Crabb about the *Gathers* case. Crabb interrupted, stating that he was not allowed to talk to Raheem about that case because Raheem was represented by counsel, but that Crabb would like to talk about other matters. Crabb asked whether Raheem knew anything about the Hill case; Raheem stated that he did; Crabb gave him *Miranda* warnings.

Crabb testified that Raheem then asked what Crabb could do for him, and when Crabb answered that he could do nothing, Raheem confessed to the Hill murder and robbery. Crabb met with Raheem alone and was the only witness to the confession. He did not call in a stenographer to record Raheem's confession; nor did he ask Raheem to put the statement in writing. Crabb took notes during the conversation; but he did not show them to Raheem or ask Raheem to initial them. A few days later, Raheem was indicted for the murder of Hill, robbery, and criminal possession of a weapon.

C. *Raheem's First Trial*

Upon the conclusion of the *Wade* and *Huntley* hearings, the state trial court denied the motions to suppress. The court found the confession admissible because when it was given, Raheem was not represented by counsel with respect to the Hill murder. The court concluded that the identifications were admissible because it found the lineup was not directed at Raheem and was not unfair:

> When [Cooke] went, he looked up and down and made an identification of number one, Mr. Whitaker; that he stated that he made the identification from his eyes and round face[ ]as well as a black leather coat and I may say that Mr. Shiloh stated that he made[ ]his identification from the face, but it was the black leather coat that convinced him it was the defendant, the number one person, who was there at the time.
>
> . . . .
>
> Counsel argues that the defendant's constitutional rights were violated in that it was an unfair lineup. I cannot under any stretch of the imagination see how this was an unfair lineup. First of all, it wasn't for the purpose of identifying the defendant to begin with. It was for the purpose of attempting to identify someone else as the perpetrator.
>
> Second, there was no testimony whatsoever that I heard of where anybody suggested or made any undue suggestions to any of the persons who viewed the lineup and I find the lineup was a proper lineup . . . .

(*Wade* Tr. 258, 260.)

Accordingly, at the ensuing trial, both Cooke and Shiloh were allowed to identify Raheem as the shooter.

Moore testified that Raheem looked "very similar to" the shooter, but that Moore "wouldn't be too positive." (First Trial Transcript ("First Trial Tr.") 309.) Hayward and Dukes testified to the events but were unable to identify Raheem. Dukes said that when Hill was shot she had looked at the shooter's gun, not at what he was wearing; and although she knew he was wearing a coat, she had no idea what color it was or even whether it was light or dark. (*See* First Trial Tr. 357, 365.) Crabb was allowed to testify that Raheem had confessed. The jury convicted Raheem on all counts.

Raheem appealed his conviction, principally challenging the admission of the identification testimony of Cooke and Shiloh and the testimony of Crabb that Raheem had confessed. The New York Supreme Court, Appellate Division, found merit in the latter challenge. *See People v. Whitaker*, 75 A.D.2d 111, 428 N.Y.S.2d 691 (2d Dep't 1980) ("*Whitaker/Raheem I*"). The court found that Crabb's testimony as to Raheem's confession was inadmissible as a matter of State constitutional law as enunciated by the New York Court of Appeals in *People v. Rogers*, 48 N.Y.2d 167, 173, 422 N.Y.S.2d 18, 21 (1979), which had held that when an accused is represented by counsel on one charge, "information [as to another matter] obtained through . . . questioning in the absence of counsel may not be used against him," *id.* at 173 n.2, 422 N.Y.S.2d at 22 n.2. In *Whitaker/Raheem I*, the Appellate Division stated that

> [i]mplicit in *Rogers* is the conclusion that unless an accused has interposed a valid waiver, he is deemed to have been denied effective representation of counsel at a crucial stage of a criminal proceeding in a situation where, although represented by an attorney, he is subjected to an in-custody police interrogation without the attorney being present;

> and that it is immaterial whether or not the interrogation is related to the charge on which the attorney has been retained or assigned.

75 A.D.2d at 123, 428 N.Y.S.2d at 699. The *Whitaker/Raheem I* court ruled that *Rogers* was to be applied retroactively, *see id.*, that the confession described by Crabb should accordingly be suppressed, and that Raheem should have a new trial.

As to the identifications, however, the Appellate Division found that suppression was not warranted because Raheem was not a suspect at the time of the lineup, and there was

> no evidence in the record to support a conclusion that the identification proceeding was not fairly conducted or that the identification of [Raheem] as the perpetrator was suggestively induced. In fact, the purpose of using [Raheem], a nonsuspect, in the lineup, was to insure that the procedure would be as fair as possible . . . .

Id. at 125, 428 N.Y.S.2d at 700. The court further stated that even "assuming the identification of [Raheem] at the lineup should be suppressed because he was compelled to participate in it, the in-court identification of [him] had a sufficient independent origin." *Id.*

D. *Raheem's Second Trial*

At Raheem's second trial, held in 1981, Cooke and Shiloh again identified Raheem as the shooter. Moore and Hayward were unable to identify Raheem. Moore, for example, when asked whether he had gotten a look at the face of the man who shot Hill in January 1976, said, "No, not too good. I can't really say I did." (Second Trial Tr. 208.)

> Q. . . . [D]o you see that man in court today? Would you look around, please, and tell me if you can see him.
>
> A. I can't really identify him. I can't really say that's him [indicating Raheem] in all honesty.
>
> Q. Do you see anybody who resembles him, who looks familiar [*sic*] to him?
>
> . . . .
>
> A. It could be him [indicating Raheem], and then it couldn't be him.

(Second Trial Tr. 209.) Hayward, who had been sitting next to Hill when Hill was shot, similarly was asked to look around the courtroom to see if he recognized the shooter. He indicated that he did not.

Cooke testified that on January 4, 1976, he had frequently glanced at Hill and the stranger near Hill and that he had no doubt Raheem was the man who shot Hill. When cross-examined as to whether he had recognized Raheem in the lineup only by his face, Cooke said, "[h]is face and his clothes" (Second Trial Tr. 194), and that he remembered "a black leather coat" (*id.*). Shiloh similarly identified Raheem as the shooter, saying that on the night of the robbery, Raheem had appeared to be a "very neat young man, dressed very neat, and he looked just like any other person who was dressed real neat" (Second Trial Tr. 110). Shiloh described what led him to recognize Raheem at the lineup:

> Q. All right. Now, when you—when you looked at Mr. Whitaker the first time in the lineup did you notice what he was wearing?
>
> A. He had a black leather coat.

Q. And how would you describe his over all appearance when you looked at him the first time in the lineup?

A. Still a neat person.

. . . .

Q. And did you notice these things the first time you looked at the lineup?

A. I did, yes, I did.

Q. Okay. But you didn't identify him at that time?

A. No.

Q. Now, *what was it that made you want to go back and look again*?

A. His face *and his black leather coat.*

Q. And did you recognize the face?

A. [Y]es.

Q. And *when you went back the second time to look at the lineup, what did you look at*?

A. I looked at his face *and that black leather coat.*

Q. And did you recognize the face?

A. Yes.

(Second Trial Tr. 110-11 (emphases added).)

The prosecution presented no other evidence to connect Raheem with the events at the Moulin Rouge. Although some fingerprints and a palm print had been collected from the bar and the getaway car, none matched the prints of Raheem. And although Moore testified that Hill, when shot, fell backwards onto the

shooter and, because an artery had been hit, got "quite a bit" of blood on the shooter's coat (Second Trial Tr. 213-14), there was no evidence at trial of any bloodstain residue on the coat owned by Raheem. Indeed, the police detective who had headed the investigation and ordered "forensic examination" of the Moulin Rouge and "other items" testified that he did not recall any scientific tests being made on Raheem's coat. (Second Trial Tr. 268-69, 276.) The jury again found Raheem guilty.

Raheem again appealed, renewing his contention, *inter alia*, that the identifications of him were the product of an unconstitutionally suggestive lineup. The Appellate Division, though modifying Raheem's sentence, found, without discussion, that the constitutional challenge was "without merit," *People v. Whitaker*, 97 A.D.2d 555, 555, 468 N.Y.S.2d 168, 169 (2d Dep't 1983) ("*Whitaker/Raheem II*"). Leave to appeal to the New York Court of Appeals was granted; but as to the merits of Raheem's challenge to the identifications, that court stated that "[t]he lower court's determination that the lineup was not suggestive involves a mixed question of law and fact which is supported by the record and thus is beyond review in this court." *People v. Whitaker*, 64 N.Y.2d 347, 351 n.*, 486 N.Y.S.2d 895, 897 n.* (1985) ("*Whitaker/Raheem III*").

E. *The District Court's Denial of Habeas*

Raheem commenced his present habeas proceeding in August 1996, pursuing his contention that his due process rights were violated because the lineup was unduly suggestive and that the identifications should thus have been excluded. In a Corrected Memorandum and Order dated April 28, 2000, reported at 98 F.Supp.2d 295, the district court denied the petition. Although the court agreed that the lineup was impermissibly suggestive, it

concluded that the identifications should be held reliable because there was other evidence of Raheem's guilt.

Applying the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), the district court found that

> the identifications simply d[id] not appear solid enough to outweigh the corrupting effect of the suggestive identification itself . . . especially given that both witnesses acknowledged that the suggestive coat was a factor in their identifications.

98 F.Supp.2d at 305 (internal quotation marks omitted). The court went on to state, however, that the *Neil v. Biggers* factors

> do not exhaust the possible ways in which identification evidence may prove to be reliable or unreliable. . . . In my view, another critical factor should be taken into account before an otherwise unassailable jury verdict is set aside in a collateral proceeding: the evidence or lack of evidence that the petitioner is guilty of the crime of which he has been convicted.

Id. Applying its "proposed rule" that other evidence of guilt may make identification testimony reliable, *id.* at 306, the district court found "three sources of corroboration in this case that together are sufficient to justify allowing the jury to decide the credence to be given to the eyewitness testimony," *id.* at 316. The three sources of corroboration were Raheem's possession of a black leather coat, his confession, and the fact that he was convicted of other murders, showing a "propensity . . . to kill":

> By far the most important is petitioner's confession, in which he admitted shooting Hill . . . . Another piece of corroborating evidence is the same thing

> that created the suggestiveness in the lineup: petitioner's three-quarter-length black leather coat, which he was wearing twenty days after the robbery. This was apparently no run of the mill garment. Arthur Shiloh explained that itw as outstanding 'because it wasn't no cheap coat.' . . . Vincent Cooke also emphasized that the coat was memorable. . . . While the fact that petitioner was the only one in the lineup wearing such a coat made his identification suggestive, the fact that he had the coat a relatively short time after the robbery provides further corroboration of his guilt.
>
> Moreover, in addition to the foregoing evidence, the record demonstrates that petitioner has a propensity not only to kill, but a preference for doing so with a bullet to the head. . . . The murder of which he was convicted here was the first of four he committed within a twenty-day period. . . . While propensity evidence may not be admissible at trial because of the danger that the jury may condemn the accused because of other criminal behavior, and not because of the evidence of guilt of the crime charged, . . . this does not preclude giving such evidence some corroborative weight for present purposes.

Id. (internal quotation marks omitted). The court also found persuasive the facts that Raheem failed to assert his innocence and presented no alibi:

> The force of the corroborative evidence of guilt is hardly undermined by the absence of an alibi or any kind of a defense case. This is not a question of drawing an adverse inference from petitioner's failure to testify at trial or at the suppression hearing. Instead, it simply reflects the absence of the kind of

> evidence that would cause one to question whether the eyewitnesses identified the right man. . . . Not only was such an alibi not offered, but neither petitioner nor his lawyer asserted his innocence, even at sentencing. While both challenged the quality of the eyewitness identifications, neither ever said, "They got the wrong man!"

Id. at 317. In light of its corroborative findings, the court determined that

> [p]articularly in this unusual case, in which the suggestive identification procedure was inadvertent—and possibly not even unnecessarily suggestive—it would be bizarre to ignore such compelling evidence of guilt and grant the writ even though there is no reason for concern about the injustice that results from the conviction of an innocent person [which] has long been at the core of our criminal justice system . . . and which underlies the due process exclusionary rule at issue here.

Id. (internal quotation marks omitted). The court also found it irrelevant that evidence of the confession and of Raheem's "predisposition to kill with a bullet to the head," was not heard by the jury, noting that the court's "corroboration rule" was "not a harmless error analysis" but was instead an analysis of "a preliminary ruling on the admissibility of evidence." *Id.*

The district court granted a certificate of appealability; this appeal followed.

II. DISCUSSION

On appeal, Raheem contends principally that the district court's proposed corroboration rule is constitutionally infirm in principle, and is infirm as applied here given the inadmissibility of the supposedly corroborat-

ing evidence. He also contends that the state courts' reliance on the fact that the lineup was not assembled with any suspicion of Raheem constitutes a misapplication of federal constitutional law. For the reasons that follow, we agree.

A. *Eyewitness Identifications and Due Process*

Due process requires that criminal trials "proceed consistently with 'that fundamental fairness' which is 'essential to the very concept of justice.' " *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir.) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)), *cert. denied*, 525 U.S. 840 (1998). When the prosecution offers testimony from an eyewitness to identify the defendant as a perpetrator of the offense, fundamental fairness requires that that identification testimony be reliable. *See, e.g.*, *Manson v. Brathwaite*, 432 U.S. 98, 112-14 (1977); *id.* at 114 ("reliability is the linchpin in determining the admissibility of identification testimony"); *see also Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissibility . . . .").

When the defendant objects to identification testimony to be given by a witness who has identified him prior to trial, a sequential inquiry is required in order to determine whether either the prior identification or an in-court identification of the defendant at trial is admissible. The court must first determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator. *See* Part II.A.1. below. If the procedures were not suggestive, the identification evidence presents no due process obstacle to admissibility, *see, e.g.*, *Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986); no further inquiry by the court is required, and "[t]he reliability of properly admitted eye-

witness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury," *Foster v. California*, 394 U.S. 440, 442 n.2 (1969). If the court finds, however, that the procedures were suggestive, it must then determine whether the identification was nonetheless independently reliable. *See* Part II.A.2. below. In sum, the identification evidence will be admissible if (a) the procedures were not suggestive or (b) the identification has independent reliability. *See, e.g.*, *Manson v. Brathwaite*, 432 U.S. at 114; *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *United States v. Salameh*, 152 F.3d 88, 126 (2d Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999).

1. *Suggestiveness*

"A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *United States v. Wade*, 388 U.S. at 228. Suggestive identification procedures "increase the likelihood of misidentification," and "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Neil v. Biggers*, 409 U.S. at 198; *see generally Simmons v. United States*, 390 U.S. 377, 384 (1968) (right to due process includes the right not to be the object of suggestive police identification procedures that create "a very substantial likelihood of irreparable misidentification"); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (examining whether procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law"); *Wray v. Johnson*, 202 F.3d 515, 524 (2d Cir. 2000); *United States v.*

Maldonado-Rivera, 922 F.2d 934, 973 (2d Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991).

A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not. "Lineups in which suspects are the only participants wearing distinctive clothing or otherwise matching important elements of the description provided by the victim have been severely criticized as substantially increasing the dangers of misidentification." *Israel v. Odom*, 521 F.2d 1370, 1374 (7th Cir. 1975). For example, where eyeglasses were "the outstanding feature of the assailant's appearance to the victim and an integral part of the description provided the police," a lineup in which the defendant was the only person wearing eyeglasses was unnecessarily suggestive. *Id.*; *see also United States v. Williams*, 469 F.2d 540 (D.C. Cir) (per curiam), *cert. denied*, 409 U.S. 872 (1972); *id.* at 547 (opinion of Bazelon, C.J., concurring in part and dissenting in part, and joined in pertinent part by remainder of panel: Where the prior description of the gunman indicated that he did not wear a hat, "[t]he showing in a lineup of four individuals wearing hats, along with a fifth, who was the prime suspect . . . and who was bareheaded was clearly improper and unnecessarily suggestive." (internal quotation marks and footnote omitted)); *id.* at 541-42 & n.7 (for a witness who had stressed the youth and short stature of the perpetrator, a lineup in which the appellant was one of only two participants who could reasonably be characterized as short, and in which the other short participant was demonstrably much older, was unduly suggestive, for "the differences in physical appearance among the participants in the lineup had the predictable effect of focusing [the witness's] attention on appellant"); *id.* at 541 (majority opinion stating that the lineups described

in Chief Judge Bazelon's opinion "would certainly not pass muster" under the principles enunciated in, *e.g.*, *Wade* and *Stovall*). In *Solomon v. Smith*, 645 F.2d 1179, 1183 (2d Cir. 1981), this Court found the pretrial identification procedures suggestive where, *inter alia*, an assailant had been described as 5'7" tall and weighing 145 pounds and a lineup was held in which the defendant, who was 5'6" tall and weighed 130 pounds, was the only person near that description—all but one of the other participants being four-to-six inches taller than the defendant and the remaining participant, though only two inches taller than the defendant, being 65 pounds (*i.e.*, 50%) heavier.

A lineup may be suggestive to one viewer even though it is not to another. Where one witness has emphasized a particular characteristic of the perpetrator in giving a description to the police, a lineup in which only the defendant has that characteristic may well taint the identification of the defendant only by that viewer. In *United States v. Williams*, for example, in which the main eyewitness had stressed that the young robber was only slightly taller than 5'1", the lineup containing only one young man who was very short was suggestive to that witness, *see* 469 F.2d at 546 (opinion of Bazelon, C.J.) ("[w]e all agree that the Williams lineup was suggestive"), though it was not suggestive to other witnesses who "were not struck by the shortness of the offender," *id.* at 542 n.7.

The defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain. *See, e.g., Solomon v. Smith*, 645 F.2d at 1185. While a witness is entitled to become surer of an identification, due process precludes the gen-

eration of that increased certainty through a suggestive lineup. *See, e.g., Simmons v. United States*, 390 U.S. at 383; *Dickerson v. Fogg*, 692 F.2d 238, 244-45 (2d Cir. 1982); *Solomon v. Smith*, 645 F.2d at 1185; *cf. United States v. Wade*, 388 U.S. at 240-41.

2. *Independent Reliability*

If the pretrial process was unduly suggestive, the court must then weigh the "corrupting effect of the suggestive[ness]" against other factors indicating that the identification may be independently reliable, *Manson v. Brathwaite*, 432 U.S. at 114, for even a suggestive procedure "does not in itself intrude upon a constitutionally protected interest" if it did not contribute significantly to the identification of the defendant, *id.* at 113 n.13. *See, e.g., Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970) (plurality opinion of Brennan, J.) (no relief warranted by fact that one of the attackers wore a hat and defendant Coleman was the only participant in the lineup to wear a hat, where it "d[id] not appear that [the witness's] identification of Coleman at the lineup was based on the fact that he remembered that Coleman had worn a hat at the time of the assault").

In determining whether a witness's in-court identification of the defendant has reliability independent of the unduly suggestive identification procedures, the court looks generally to the factors set out in *Neil v. Biggers*, taking into account "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. at 199-200; *accord Manson v. Brathwaite*, 432 U.S. at 114. A good

or poor rating with respect to any one of these factors will generally not be dispositive, *see, e.g., United States v. Concepcion*, 983 F.2d 369, 377 (2d Cir. 1992), *cert. denied*, 510 U.S. 856 (1993), and in each case, the question of independent reliability must be assessed in light of the totality of the circumstances, *see, e.g., Neil v. Biggers*, 409 U.S. at 199; *Coleman v. Alabama*, 399 U.S. at 4 (plurality opinion of Brennan, J.); *Stovall v. Denno*, 388 U.S. at 302.

B. *The Lineup's Suggestiveness as to Raheem*

In the present case, as the district court found and as the description in Part I.B. above of the record of the state-court proceedings demonstrates, the lineup in which Raheem appeared in his black leather coat was plainly suggestive to Cooke and Shiloh. Those two witnesses had given the police descriptions that emphasized the shooter's black leather coat. Cooke, for example, testified that in giving the police "the best [description] that [he] could remember," he had "figured [the shooter] was about five[-]seven. I know he had on a black leather coat and he had on a black cap. That I can remember." (Second Trial Tr. 183.) Shiloh testified that he told a police detective that the shooter "was dressed very neat, brown skin, had a black leather coat and a cap. That's the best description." (*Wade* Tr. 130.) Indeed, "three quarter length black coat" (*Wade* Tr. 233) was the only part of any witness's description that was mentioned in the testimony of any police officer.

With respect to their selections of Raheem from the lineup, in which only Raheem appeared in a black leather coat, Cooke and Shiloh repeatedly mentioned the impact of the coat. Cooke testified that Raheem "appeared to be the one that I remember in the bar. And I could tell from his, you know—his coat is another

thing. He had on a leather coat that I remembered." (*Wade* Tr. 147; *see also* Second Trial Tr. 194 (in the lineup, Cook was "struck" by the fact that Raheem was wearing "a black leather coat").) Shiloh, who at first failed to identify anyone in the lineup, testified that what made him want to view the lineup a second time was "[Raheem's] face and his black leather coat" and that when he returned to view the lineup a second time, he looked at Raheem's face "and that black leather coat." (Second Trial Tr. 111.) Shiloh stated that at the lineup "the black leather coat really set it off for me." (*Wade* Tr. 147.) Indeed, before prolonged questioning by the court eventually elicited from Shiloh the response that he would have selected Raheem from the lineup even if Raheem had not been wearing a black leather coat (*see Wade* Tr. 149-50), Shiloh repeatedly said that his identification of Raheem was based, in whole or in part, on the coat:

> Q. That black leather coat was outstanding in your mind?
>
> A. Right, because it wasn't no cheap coat.

(*Wade* Tr. 147.)

> Q. The fact that John Whitaker was wearing a black leather coat in this lineup and that one of the men in the bar that evening was wearing a black leather coat, you put those two facts together, is that right?
>
> A. I am just going by what I saw what he was wearing. That is what I am talking about.

(*Wade* Tr. 148.)

> Q. . . . . Mr. Shiloh, the elements that went through your mind at the time that you asked to make this identification, did you make the identi-

fication basically on the facts that the man in the bar on January the 4th was wearing a neat[ ]black leather coat and John Whitaker, number one in the lineup, was wearing a black leather coat?

A. Right

THE COURT: Is that the sole basis for your identification?

THE WITNESS: Yes.

THE COURT: The only basis?

THE WITNESS: Yes.

THE COURT: Not the face and the features?

THE WITNESS: The feature and the face and the black leather jacket.

(*Wade* Tr. 148-49.)

Accordingly, even the state trial court, which declined to suppress the identifications by Cooke and Shiloh, found that Cooke "stated that he made the identification from [Raheem's] eyes and round face[ ]*as well as a black leather coat*," and that "Shiloh stated that he made his identification from the face, but *it was the black leather coat that convinced him it was the defendant*, the number one person, who was there at the time." (*Wade* Tr. 258 (emphases added).)

Plainly, the black leather coat worn by the shooter at the Moulin Rouge was the outstanding feature of the assailant's appearance in the minds of Cooke and Shiloh, was an integral part of the description that each provided to the police, and was a critical factor in those witnesses' selection of Raheem from the lineup.

The State contends that the lineup was not suggestive because the goal was to present persons whose appearances were similar to that of Webb, the man the police

had arrested as their suspect. This argument is wide of the mark. A lineup plainly may be nonsuggestive with respect to one participant but suggestive as to another where the appearances of the two are different and only the latter meets the viewing witness's prior description. To the extent that the State means to emphasize that its assemblage of a lineup that was suggestive as to Raheem was unintentional, that argument is immaterial. The purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification. *See, e.g., Thigpen v. Cory*, 804 F.2d 893, 895-96 (6th Cir. 1986); *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980); *see generally Manson v. Brathwaite*, 432 U.S. at 112-14 (question of whether the police procedures constituted misconduct is not determinative of whether an identification was suggestive). "It is certainly possible that an in-court identification by a prosecution witness may prove to be unreliable, even though the pre-trial encounter in question has not involved any culpable police conduct." *Green v. Loggins*, 614 F.2d at 222; *see also Israel v. Odom*, 521 F.2d at 1374 n.7 (where witness had emphasized the assailant's eyeglasses, and there was no evidence to indicate that the police in any way suggested or required that the defendant wear his eyeglasses in the lineup, "[t]he suggestiveness of the identification procedure result[ed], not from police motive or misbehavior, but from the fact that [the defendant] was the only lineup participant to be wearing glasses"). Here, although it apparently was happenstance that Raheem was at the 77th Precinct when the lineup was being assembled for Webb, the fact remains that the most prominent feature that had been mentioned by Cooke and Shiloh in their descriptions to the police was the shooter's black leather coat. As to those witnesses, the

appearance of Raheem as the only participant in the lineup wearing such a coat was unnecessarily suggestive.

The State also argues that the lineup should not be found suggestive because "one of the witnesses who viewed the lineup, Cecile Dukes, was unable to make an identification, despite her opportunity to observe the gunman on the night of the shooting . . . ." (State brief on appeal at 30.) But this argument proves too much: Dukes had not noticed details of the coat the shooter was wearing, or even whether his coat was light or dark (*see* First Trial Tr. 365). Thus, a lineup in which only one of the participants wore a black leather coat was not suggestive to Dukes. The only witnesses who selected Raheem from the lineup were Cooke and Shiloh, both of whom had noticed and described to the police the shooter's coat. And those witnesses clearly indicated that their selection of Raheem was influenced by his wearing such a coat. As to Cooke and Shiloh, the lineup was suggestive.

C. *Reliability Independent of the Black Leather Coat*

The question remains whether the identifications of Raheem by Cooke and Shiloh had reliability independent of the suggestive lineup. Looking to the *Neil v. Biggers* factors discussed in Part II.A.2. above, to wit, the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation, we note that most of those factors in this case give at best mixed signals and ultimately, in light of the circumstances as a whole, do not suggest reliability independent of the black leather coat.

The witnesses' opportunity to view the shooter was good in terms of the duration of the overall encounter. The robbers were in the Moulin Rouge for some 15 minutes before Hill was shot. On the other hand, Cooke felt that the bar was dimly lit, and he acknowledged that he was wearing "prescription shades" (Second Trial Tr. 189). We note that Cooke also testified that he saw the shooter again when the shooter came to the door of the bathroom where the bar patrons had been herded, to ask which key fit Moore's car (*see Wade* Tr. 162; Second Trial Tr. 177-78), though Moore's own testimony was that no one came to the bathroom to ask him about his keys (*see* Second Trial Tr. 215). The opportunity factor, on balance, seems to favor reliability.

As to the witnesses' degree of attention, Cooke and Shiloh testified that during the 15 minutes in question they frequently glanced at the strangers. On the other hand, they were also chatting, drinking scotch, and watching a football game. Further, immediately after they heard the shot and saw the shooter holding a gun, the hold-up was announced, and the man standing closest to Shiloh, Cooke, and Moore brandished his gun at them. Plainly their attention was immediately focused more on that man than on the man who had shot Hill; indeed, Shiloh testified that he did not pay any attention to the shooter after the second robber pointed his gun toward Shiloh, Cooke, and Moore. (Second Trial Tr. 126-27.) Further, it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it. (*See, e.g.*, Second Trial Tr. 210 (Moore: "Actually, you're looking at the gun more than anything else, you know."); *see also* First Trial Tr. 357-58 (Dukes: ("I just looked at the gun. That's all I look. I didn't look at [the shooter].").) Thus, Cooke and Shiloh, independently of one another, selected the wrong person (one who was in

prison at the time of the robbery) from a photo array as the gunman who had accosted them directly and taken their money and jewelry. The record provides no reason to believe that their attention to the face of the man who had shot Hill was any greater than their attention to the face of the man who directly robbed them at gunpoint, whom they misidentified.

Nor do the descriptions of the shooter given by Cooke and Shiloh to the police instill any confidence as to the reliability of their identifications of Raheem as the shooter independently of the black leather coat, for though they provided general information as to the shooter's age, height, and weight, they provided virtually no detail about his face. Cooke, for example, had said the shooter's face was round and without a moustache; but he had been unable to cite any other physical details. Although he mentioned the shooter's eyes, his recollection was not of a physical feature such as color, shape, or protrusion, *compare Dunnigan v. Keane*, 137 F.3d at 121 ("bugged eyes"); rather, his description of the eyes as "weird" (Second Trial Tr. 184) because of the shooter's "glare" or the manner in which he "fixed his eyes" (*Wade* Tr. 186) was merely a description of demeanor. "How could you describe his eyes? They were different. That's how I put it, something about it that stood out." (*Id.*) Cooke further testified that he "d[id]n't remember anything about the mouth" (*id.*) and had no impression "about the nose" (*Wade* Tr. 187). As the state trial court, in sustaining an objection to further probing at the *Wade* hearing, summarized Cooke's testimony, "He has already described to you, counsellor, what impression he had and he said *it was the round face and the eyes and that's all.*" (*Wade* Tr. 187-88 (emphasis added).)

Nor had Shiloh provided any details of the shooter's face, for he had not noticed his "features, his eyes . . .

[o]r the shape of his head," or the length of his hair. (*Wade* Tr. 125; *see* Second Trial Tr. 122.) He testified in part as follows:

> Q. *Did you notice* at that time in the Moulin Rouge Bar, Mr. Shiloh[,] *anything distinctive* about John Whitaker?
>
> A. *The only thing I could see he was dressed very neat, very neat.*
>
> Q. Well, you told us that you saw a man smaller than a companion of his wearing a leather cap and a leather coat, and you say that man was dressed neatly. *Was there anything else about the[ ]person that you observed at that time that you retained in your mind*?
>
> A. *No.*

(*Wade* Tr. 124 (emphases added).)

Thus, the prior descriptions by Cooke and Shiloh of the shooter cannot be viewed as indicia of independent reliability as to their selection of Raheem. Indeed, far from having described any features that were distinctive, Shiloh testified that the shooter had "looked just like any other person who was dressed real neat." (Second Trial Tr. 110.)

The level of certainty exhibited by Cooke and Shiloh in their identifications was mixed. Cooke apparently showed no uncertainty in selecting Raheem. Shiloh, in contrast, at first identified no one. Even after selecting Raheem upon the second viewing, Shiloh said that he had "ha[d] a little doubt" and was "[n]ot positive" (*Wade* Tr. 147), stating that it was the black leather coat that decided it for him (*see id.*). To the extent that either Cooke or Shiloh exhibited certainty, we find it difficult to view that certainty as an indicator of reliability inde-

pendent of the suggestive lineup, given their lack of recollection as to any physical features of the shooter's face (except, as to Cooke, its roundness). Whatever their certainty, it was engendered by the suggestive element itself, the black leather coat.

Finally, the length of time between the crime and the confrontation does not, given all the circumstances here, suggest reliability. While the time between the crime and the lineup—less than three weeks—was not great, it is noteworthy that Cooke and Shiloh, independently of one another, had made wrong identifications of the gunman closest to them from a photo array less than one week after the event. Thus, for Cooke and Shiloh, the three-week interval between the event and their selection of Raheem was hardly an indicator that their recollections of the shooter were reliable. We note also that the interval between the crime and the in-court identifications by Cooke and Shiloh at Raheem's second trial was more than five years. We see nothing to suggest that those witnesses' identifications of Raheem became more reliable during that period.

Given the poor ratings of Cooke and Shiloh on most of the *Neil v. Biggers* factors, and in light of the totality of the circumstances, which included their inability to describe any features of the shooter's face, the misidentification by both witnesses of the gunman who had been closest to them and had physically taken property from them, the fact that what both witnesses called the "best" description they could give of the shooter focused not at all on his face but emphasized his black leather coat (Second Trial Tr. 183 (Cooke); *Wade* Tr. 130 (Shiloh)), and the fact that both witnesses repeatedly cited the coat worn by Raheem as influential in their selection of him, we cannot conclude that the identifications by Cooke and Shiloh had reliability independent of the black leather coat.

D. *The Corroboration Theory*

The State urges us to adopt the district court's view that the identifications by Cooke and Shiloh were reliable because of corroborative evidence of Raheem's guilt, to wit, Crabb's testimony as to Raheem's confession, the evidence that Raheem had committed other murders, and the fact that Raheem possessed a black leather coat. Even if we viewed these items as reliable evidence of guilt, we would decline to adopt such an analysis, which we believe confuses the due process inquiry with harmless-error analysis.

Reliability, in the identification context, means essentially that the witness's recollection was "[un]distorted," *Manson v. Brathwaite*, 432 U.S. at 112, and proper inquiry seeks to fathom whether the witness's identification is worthy of reliance, that is, whether it provides a foundation on which the factfinder can reasonably depend. This inquiry differs from the inquiry into the trustworthiness of the verdict. For example, even where there was irrefutable evidence of the defendant's guilt, if an identification were made by a witness who, it transpired, was not even present at the event, we could hardly term the identification reliable.

We read *Manson v. Brathwaite* as consistent with our view. In that case, the Supreme Court applied the *Neil v. Biggers* factors in determining that the identification at issue was reliable, and it then referred to trial evidence that was corroborative of guilt, noting, for example, the frequent presence of the defendant at the site of the illegal activity; but the Court stated that that evidence "plays no part in our analysis" of the identification's reliability. *Manson v. Brathwaite*, 432 U.S. at 116. That observation in the majority opinion was further emphasized in Justice Stevens's concurrence:

> [I]n evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side. . . . Mr. Justice Blackmun's opinion for the Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself."

Id. at 118 (Stevens, J., concurring).

Thus, to the extent that some of our Sister Circuits have indicated that their assessment of an identification's reliability (as distinct from their harmless-error analysis) may include consideration of unrelated evidence corroborating the defendant's guilt, *see, e.g.*, *United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996), *cert. denied*, 522 U.S. 934 (1997); *United States v. Napoli*, 814 F.2d 1151, 1156-57, 1161 (7th Cir. 1987), we disagree. We concur in the views of those courts that confine their consideration of unrelated corroboration of guilt to their assessment of whether the error in admitting identification testimony resulting from unnecessarily suggestive procedures was harmless. *See, e.g.*, *United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997); *United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995). As the Third Circuit stated in *Emanuele*, resort to unrelated corroborative evidence is

> contrary to the Supreme Court's guidance in *Brathwaite* that other evidence indicating a defendant's guilt plays no part in our analysis of reliability. . . . We caution, therefore, that only factors relating to the reliability of the identification will be relevant to a due process analysis. Independent evidence of culpability will not cure a tainted identification procedure, nor will exculpatory information bar admission of reliable identification testimony.

> We will consider other evidence only to determine whether an error, if present, was harmless.

Id. (internal quotation marks omitted). We too conclude that evidence of record that is unrelated to an identification but that is supportive of a finding of guilt is properly considered in harmless-error analysis, not in the due process inquiry of whether the identification has reliability.

In addition, we note our difficulty with some of the factors that the district court cited in connection with its conclusion that the identifications by Cooke and Shiloh were reliable. For example, the view that the identifications by Cooke and Shiloh of Raheem in the lineup—which was suggestive precisely because Raheem alone was wearing a black leather coat—were reliable because Raheem "was wearing" a "black leather coat . . . twenty days after the robbery," 98 F.Supp.2d at 316, has an air of circularity. The State submitted no proof that the coat worn by Raheem was the same coat worn by the shooter. Although the district court stated that "Cooke . . . emphasized that the coat was memorable," *id.*, there was no evidence to suggest that either the shooter's black leather coat or that worn by Raheem had any distinguishing characteristics or unusual styling. Raheem's coat was not introduced at trial. The court did not elaborate on what made the shooter's coat "memorable," and, so far as we have seen in the record, neither did Cooke. Nor was scientific evidence offered to connect Raheem's coat to the events at the Moulin Rouge. The police detective in charge of the investigation, who had ordered forensic examination of the bar and "other items," testified that he did not recall whether any tests had been performed on Raheem's coat (Second Trial Tr. 268-69, 276) for any residue of the copious amounts of

blood that Moore said had stained the coat worn by the shooter.

Nor do we view the confession described by Crabb or the "propensity" evidence as appropriate resources for determining the reliability of the identifications by Cooke and Shiloh. Such evidence might have been considered as factors in harmless-error analysis if it were admissible and had been admitted. But the confession evidence was inadmissible, *see People v. Rogers*, 48 N.Y.2d at 173 n.2, 422 N.Y.S.2d at 22 n.2 (as a matter of State constitutional law, "information obtained through . . . questioning in the absence of counsel [may] not be used against [a defendant"); and even if the propensity evidence had been admitted at trial to show, for example, a pattern indicative of Raheem's identity as the perpetrator, that prior-act evidence would not mean that other evidence that is unworthy of reliance would also be admissible.

We note also that we are not convinced, as was the district court, that the "evidence of [Raheem's] guilt" was "compelling," 98 F.Supp.2d at 317. Surely the identifications by Cooke and Shiloh did not fall into that category; they were not even reliable. Nor would we place the confession evidence in that category. Crabb's testimony was that Raheem first pointed out that he had gotten into difficulty by giving a statement to Crabb about the *Gathers* matter, resulting in a felony-murder charge; then, when Crabb said he wanted to talk about the Hill murder, Raheem asked what Crabb could do for him on that matter; and when Crabb responded that he could do nothing, Raheem promptly confessed. Further, Crabb, the only witness to that conversation, did not call in a stenographer or another officer, did not ask Raheem to write out his confession, and did not ask Raheem to review or initial Crabb's notes. Although the jury at Raheem's first trial apparently credited Crabb's testi-

mony, as it plainly was entitled to do, we do not consider his testimony "compelling." And Raheem's possession of a black leather coat was hardly compelling, especially since the police either did not bother to test Raheem's coat for bloodstain residue, or did not find the results of such a test memorable.

We note, finally, our disagreement with the district court's reliance on the facts that Raheem failed to produce an alibi, failed to present a defense, and failed to "assert[ ] his innocence, even at sentencing," 98 F.Supp.2d at 317. As ingredients in the district court's analysis of the trial court's "preliminary ruling on the admissibility of evidence," *id.*, the last two facts are anachronistic. And none of them justified the admission in evidence of testimony that was not reliable.

E. *Harmless-Error Analysis*

An error is not harmless if it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted). The principal factors to be considered in the determination of whether the erroneous admission of evidence was harmless are "the importance of the witness's wrongly admitted testimony, and the overall strength of the prosecution's case." *Wray v. Johnson*, 202 F.3d at 526. In assessing importance, we consider questions such as "whether the testimony bore on an issue that is plainly critical to the jury's decision, . . . whether that testimony was material to the establishment of the critical fact or whether it was instead corroborated and cumulative, . . . and whether the wrongly admitted evidence was emphasized in arguments to the jury." *Id.* (internal quotation marks omitted). The State has not argued here that error in the

admission of the identifications by Cooke and Shiloh was harmless, and we conclude that it was not.

The identification testimony of Cooke and Shiloh clearly bore on an essential issue, the identity of the shooter. And that testimony was crucial to the prosecution's case, for the State presented no evidence other than the testimony of Cooke and Shiloh to tie Raheem to the events. None of the other persons who had been present at the Moulin Rouge could identify Raheem. And State law forbade the introduction of Crabb's testimony that Raheem had confessed.

Nor was any physical evidence offered to identify Raheem as the shooter. Although some fingerprints and a palm print had been gathered from the bar and from Moore's car, which the robbers used in their getaway, no prints matched those of Raheem. And although presumably the State had possession of the coat worn by Raheem in the lineup, and Moore testified that "quite a bit" of Hill's blood had gotten on the shooter's coat (Second Trial Tr. 213-14), there was no testimony that Raheem's coat bore any evidence of bloodstain residue.

It is hardly surprising, therefore, that in its summation, the prosecution emphasized the identification testimony of Cooke and Shiloh. As to the identity of the shooter, the State had presented nothing else. The error in admitting that testimony cannot be termed harmless.

CONCLUSION

We have considered all of the State's arguments in support of the district court's decision and have found them to be without merit. The judgment dismissing the petition is reversed. The matter is remanded for entry of a judgment granting the writ, ordering that Raheem's convictions of offenses in connection with the murder and robbery at the Moulin Rouge on January 4, 1976, be vacated, and conditionally ordering that charges of those offenses be dismissed unless the State affords Raheem a new trial within 120 days. We note that because Raheem is serving concurrent prison terms of 25 years to life on the basis of other convictions as well, the judgment in this case does not require his release.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

96-CV-3851 (ERK)

JEHAN ABDUR-RAHEEM,
formerly known as JOHN WHITAKER,

Petitioner,

—against—

WALTER KELLY, Superintendent,
Attica Correctional Facility,

Respondent.

CORRECTED MEMORANDUM & ORDER

KORMAN, Chief Judge

On the evening of January 4, 1976, four men were sitting at the bar of the Moulin Rouge in Brooklyn, drinking, talking, and watching Dallas trounce Miami in the Superbowl. W-94-95, T2-118, 206.[1] Before the game

[1] I take judicial notice that, contrary to the witnesses' and hearing judge's recollection, the 1976 Superbowl took place on January 18 between the Dallas Cowboys and the Pittsburgh Steelers, resulting in a narrow win for Pittsburgh, 21-17. On January 4, 1976, the Cowboys played Los Angeles in an NFC playoff game, beating them by a resounding 37-8. See http://www.geocities.com/~jrbeasley/dallas/seasons/75over.html.

ended, one of them, Charles Hill, was shot in the head by John Whitaker, as petitioner was then known. He would later confess to the murder, one of four of which he stands convicted, all committed within a period of twenty days. The victims were each felled by a bullet to the head. Sentencing Hearing, April 6, 1981, p. 12. Of the four judgments of conviction, two were entered upon jury verdicts. Petitioner was sentenced to twenty-five years to life—the sentences to run consecutively—on the judgments entered in these two cases. The conviction challenged in this petition is the basis for the second of the two consecutive sentences.[2] Petitioner pled guilty to the other two murders with the understanding that he could withdraw the guilty pleas and have the convictions set aside if he successfully challenged both of the judgments entered after trial.

The petition here challenges the conviction for the murder of Charles Hill. The issue raised is the admissibility of the eyewitness identifications that were made twenty days after the murder of Charles Hill. The lineup was inadvertently suggestive. Petitioner was the only person in the lineup who wore a three-quarter-length black leather jacket, recognized by the eyewitnesses as the same one worn by the man who killed Charles Hill. The suggestion was clearly inadvertent, however, because the subject of the lineup was a person other than petitioner. Petitioner, who was under arrest for one of the other murders, was put into the lineup as a filler.

The case turns on the admissibility of the identification evidence, because the confession petitioner gave was suppressed. The ground for suppression was that, at the time he confessed, petitioner was represented by

---

[2] A petition challenging the other judgment entered after trial was dismissed by Judge Trager. *Abdur-Raheem v. Kelly*, No. 97 CV 2126 (E.D.N.Y., March 17, 1999), certificate of appealability denied, No. 99-2282 (2d Cir., January 27, 2000).

counsel on the other murder for which he had been jailed at the time of the lineup. *People v. Whitaker*, [75 A.D.2d 111,] 428 N.Y.S.2d 691, 692-93 (N.Y.A.D., 2d Dept 1980). This ground—peculiar to New York jurisprudence—would not have provided a basis for suppression under the United States Constitution. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207 (1991). The question presented, then, is whether a conviction should be set aside because of inadvertently suggestive eyewitness identifications where the record demonstrates that the eyewitnesses picked out the right man.

Background

The shooting occurred, as previously indicated, in a bar, while the attention of the patrons was focused on the Superbowl and on their conversation with each other. Arthur Shiloh, Vincent Cooke, and Samuel Hayward were regulars at the Moulin Rouge. T2-41-42, 163, 259. Shortly before the killing, Shiloh and Cooke were sitting there together, drinking scotch. W-84, 94, 155, 189; T2-208. Shiloh was having his third drink of the day, W-110, and Cooke was working on his second. W-189-190; T2-187. Hayward, who had had three or four drinks before arriving at the Moulin Rouge, T2-260, was sitting down the bar next to Charles Hill, part owner of the bar and an off-duty corrections officer. T2-261. Cecile Dukes was tending bar. T-337-338. Around six o'clock, another regular customer, Winfred Moore, came in and joined his friends Shiloh and Cooke at the bar, T2-206-207.

Three strangers entered the bar together and then split up. W-197. One took up a position near the window at the front of the bar. W-104,157. The other two went to the bathroom, and upon returning began to talk with Hill, T2-61, one standing near the door and the other

near the wall. After some time (witness estimates ranged from 10 to 30 minutes from the time the strangers entered the bar, W-104, 160, 199), the man near the wall (later identified as petitioner) shot and killed Hill, who fell to the floor. W-117, 161.

After the shooting, the man near the door pulled out a pistol and announced, "This is a stickup." T2-70. He then took Shiloh's money and Cooke's money, ring, and watch. T2-70. The man who shot Hill took a gun off Hill's body. T2-262. He took Moore's money, driver's license, car registration, and keys. T2-209. One of the three strangers took Hayward's wallet. T2-263. The man who had been standing by the window jumped over the bar and emptied the cash register. W-160. The man who had announced the stick up herded all the witnesses into the bathroom at the back of the bar. T2-70. According to Cooke, the shooter (petitioner) came back to the bathroom and asked Moore which key started his car. T2-178. Moore, however, said no such thing ever happened. T2-215. When the witnesses emerged from the bathroom, the robbers were gone. All the witnesses noticed that the shooter was wearing a black leather coat, and gave that description to the police. W-130, 182, 233; T2-214. A police flyer circulated after the shooting, however, indicated only that the killer wore a "black 3/4 length coat." W-233, 254.

Some three weeks after the crime, on January 24, 1976, the police arrested a suspect, Lindsay Webb, in the murder of Charles Hill. W-215. Detective Anthony Martin decided to conduct a lineup. W-215. Since he was able to get only three black police officers to serve as "fillers," he filled out the line with two African-American men who happened to be in custody on unrelated crimes. W-216-217. One was petitioner, who was being questioned at the precinct that day about the murder of one Harriet Gathers. W-217. Unlike any of the other men

in the lineup, petitioner happened to be wearing a black leather coat. T2-202.

Cecile Dukes, Arthur Shiloh, and Vincent Cooke viewed the lineup. The three witnesses waited together in a room at the precinct and were brought in to view the lineup one by one. W-220-221. Dukes, who went first, recognized no one. W-219. Shiloh was next, and after two or three minutes was also unable to identify anyone in the lineup as one of the robbers. W-90, 140-141. Cooke was the last to view the lineup. He identified petitioner as the man who shot Charles Hill. W-165, 220. Cooke described his identification:

> Well, I looked them all over carefully because I didn't want to make any mistakes and then I picked number one, the guy. . . . I said he appeared to be the one that I remember in the bar. And I could tell from his, you know—his coat is another thing. He had on a leather coat that I remembered. W-165

After Cooke returned to the room where the other witnesses were waiting, Shiloh asked to view the lineup again. W-220. This time he picked petitioner as the shooter. W-220. Shiloh explained,

> When I looked through the window the second time, I looked at the lineup, I looked at number one. I said, that has to be the man. W-146.
>
> . . . .
>
> . . . I said that was the man, really, because you see like at the time he was standing there he didn't have the cap on, and but [sic] face features of him the black leather coat, the same thing, the black leather coat really set it off for me. W-147.

A month later, on February 24, 1976, Detective Clarence Crabb interviewed petitioner about the Hill homicide. T-694-702. According to Crabb, after being advised of his rights, petitioner told Crabb that he and two other men, Robert Blackman and Johnny Johnson, had been on their way to stick up another establishment when they stopped in the Moulin Rouge to get warm. T-701. While they were in the bar watching TV, petitioner noticed that a man seated at the bar started to move as though he were reaching for his "piece." T-701-702. Petitioner warned the man not to "do something foolish," T-702, and the man paused, but then reached for his gun. T-702. Petitioner told Crabb, "that's when I shot him, and when I shot him, Johnny Johnson jumped over the bar and announced this is a stick up. He went into the cash register and took the money out." T-702. By Crabb's account, petitioner's admissions continued with the details of the shooting's aftermath:

> He said Bobby Blackman, Johnny Johnson herded all the people in the bar to the rear. He said when they got ready to leave, he said I took some car keys from one of the people that was in the bar that had a car parked outside and he said I drove the car. We got in. I drove the car to a side street off of Herkimer Street, that was near his house. He said Bobby Blackman, he says I gave Bobby Blackman Hill's gun, he says, and he sold it someplace in the street. He wouldn't tell me what he did with his gun. He just said that he sold it. T-702.

Petitioner was subsequently indicted for the murder of Charles Hill and the robberies at the Moulin Rouge. His counsel moved to suppress any admissions or confessions and the identifications. At a *Huntley* hearing held on January 6, 1977, Detective Crabb testified about

petitioner's confession. H-58-59. Crabb explained that he had arrested petitioner on January 24, 1976 for the murder of Harriet Gathers, H-26, and the meeting at which he took petitioner's statement took place at the Brooklyn House of Detention where petitioner was being held in connection with that charge. According to Crabb, while petitioner was in detention he phoned Crabb twice asking to see him. H-33-34. Crabb testified that he got permission from his commanding officer and conferred with the district attorney's office before visiting petitioner. H-38-39.

When Crabb arrived at the Brooklyn House of Detention, he was locked in a cell alone with petitioner, who signed a form consenting to the visit. H-19. After some opening pleasantries petitioner began to talk to him about the Gathers case, and Crabb responded that he could not discuss that crime because petitioner had already been indicted. H-20. Then Crabb told petitioner he wanted to talk about the Hill homicide. H-20. When petitioner agreed, Crabb read him his Miranda rights. H-20. According to Crabb, petitioner then asked what Crabb would be able to do for him, and Crabb explained that he could not do anything personally, that it was up to the district attorney's office. H-21-22. At that point, Crabb testified, petitioner proceeded to give him the information that Crabb later typed as the statement. H-22. Asked at the trial whether he had ever suggested that petitioner write out or initial his statement, he said that he had not. T-710. Such a suggestion would seemingly have been pointless because, while Crabb was making notes of petitioner's statement, petitioner asked what he was doing and then told Crabb that he could never go to court with the statement because petitioner would deny it. T-713.

Petitioner challenged the statement he allegedly made to Detective Crabb on the grounds that "there has not

been a showing beyond a reasonable doubt that a voluntary statement or admission or confession was made," that petitioner had not been properly Mirandized, and that the detective spoke with him in violation of his Sixth Amendment right to counsel. H-64. At the conclusion of the hearing, the judge ruled that there was no Miranda violation because the detective did not initiate the conversation leading to the statement. H-74. Regarding the right-to-counsel claim, the judge held that "[t]he fact that [petitioner] is represented by counsel in one matter does not preclude a police officer from speaking to him on an unrelated matter." H-75. Denying the suppression motion, the judge concluded that "the oral statement made by the defendant to the detective was voluntarily made, initiated by the defendant himself and also that his Sixth Amendment Constitutional rights as well as the Fifth Amendment Constitutional rights were not violated at all." H-75-76.

On January 10, 1977 a *Wade* hearing was held to determine the admissibility of identification testimony. Arthur Shiloh, Vincent Cooke, and Detective Anthony Martin testified. Cooke testified that when he viewed the lineup, petitioner "appeared to be the one that I remember in the bar. And I could tell from his, you know—his coat is another thing. He had on a leather coat that I remembered." W-165. When asked later in the Wade Hearing, "What was the basis for your picking out Mr. Whitaker," Cooke responded, "His face." W-166. The prosecutor followed up: "What were you thinking back to when you made the identification?" Cooke answered, "How he looked like the man that I saw in the bar. And the clothes. You know, he had on the same clothes. I looked at the round face." W-166. During cross-examination, Cooke was pressed to say whether there was anything "peculiar about the face that stuck in his mind." W-185-186. He responded again that the face was

"round" and added that there was something "different" about the eyes, that "stood out." W-186. Asked whether he was "absolutely sure" when he picked petitioner out of the lineup, he replied, "Well, after I picked him out, I was convinced." W-184.

Arthur Shiloh explained that, having failed to identify anyone on his first viewing of the lineup, and having asked to see the lineup again, on his second viewing, "the black leather coat really set if off for me." W-147. At that point the hearing judge asked Shiloh whether the coat was "the sole basis" for his identification of petitioner, and Shiloh at first responded, "Yes." W-148-149. The following colloquy then ensued:

> Court: The only basis?
>
> Shiloh: Yes.
>
> Court: Not the face and the features?
>
> Shiloh: The feature and the face and the black leather jacket.
>
> Court: What I asked you was it only the black leather coat. If somebody else in that lineup, number 5 let's say was wearing a neat black leather coat, and Whitaker was not wearing a black leather coat, would you have picked him out?
>
> Shiloh: Yes. By the face.
>
> Court: Would you have picked him out?
>
> Shiloh: Yes.

W-149.

At the close of the hearing, the judge denied the suppression motion. Regarding the lineup, he explained that Cooke "made the identification from his eyes and round face as well as a black leather coat." W-258. The judge

also noted that "Shiloh stated that he made his identification from the face, but it was the black leather coat that convinced him it was the defendant." W-258.

The judge concluded,

> I cannot under any stretch of the imagination see how this was an unfair lineup. First of all, it wasn't for the purpose of identifying the defendant to begin with. It was for the purpose of attempting to identify someone else as the perpetrator.
>
> Second, there was no testimony whatsoever that I heard of where anybody suggested or made any undue suggestions to any of the persons who viewed the lineup and I find the lineup was a proper lineup and as far as that argument of being an unfair lineup is concerned, I do not believe that it holds any water whatsoever.

W-260. There were no other findings of fact made by the trial judge.

Petitioner was then tried and convicted of murder in the second degree, three counts of robbery in the first degree, and criminal possession of a weapon in the second degree. At trial, the identification testimony of Cooke and Shiloh, and Detective Crabb's testimony about the confession, was substantially the same as their testimony at the pretrial hearings. Petitioner's conviction was reversed based on a retroactive application of *People v. Rogers*, 48 N.Y.2d 167, 422 N.Y.S.2d 18 (1979), decided two years after the trial, which held that a defendant represented by counsel in a criminal case may not be interrogated in the absence of his attorney, even on unrelated charges. *People v. Whitaker*, [75 A.D.2d 111,] 428 N.Y.S.2d 691 (N.Y.A.D. 2d Dept.1980). The order denying the motion to suppress the eyewitness identification was affirmed, thus making a retrial possible.

Petitioner was retried, this time without testimony about his alleged admissions to Detective Crabb. At the second trial, Arthur Shiloh and Vincent Cooke again testified about the crime and their identifications of petitioner in the lineup. They also identified him in court. Winfred Moore and Samuel Hayward testified about the events at the Moulin Rouge, but were unable to identify petitioner. Petitioner was again convicted of murder in the second degree, three counts of robbery in the first degree, and one count of criminal possession of a weapon in the second degree. He was sentenced on April 6, 1981 to a term of 25 years to life on the murder count, a concurrent term of 5 to 15 years for the weapon possession, and three terms of 8 1/3 to 25 years on the robbery counts, concurrent with each other, but consecutive to the sentence for murder.

On October 31, 1983, the Appellate Division modified the sentence to run the robbery sentences concurrently with the murder sentence and affirmed the conviction as modified. *People v. Whitaker*, [97 A.D.2d 555,] 468 N.Y.S.2d 168 (2d Dept. 1983). Petitioner appealed to the New York Court of Appeals, which affirmed, noting that petitioner challenged the lineup on several grounds, but asserting that "the only issue which is within the scope of our review is his contention that using him as a filler in a lineup without his consent constituted an illegal seizure," an argument it rejected. 64 N.Y.2d 347, 351, 486 N.Y.S.2d 895, 897 (1985). The Court of Appeals explained that the "determination that the lineup was not suggestive involves a mixed question of law and fact which is supported by the record and thus is beyond review in this court." *Id.* at n *. A petition for a writ of certiorari was denied. *Whitaker v. New York*, 474 U.S. 830, 106 S. Ct. 95 (1985). Eleven years later, Abdur-Raheem filed this petition for a writ of habeas corpus.

Discussion

Petitioner contends that his conviction must be reversed because it was based on an identification that was unduly suggestive and unreliable and thus violated his due process rights under the 14th Amendment. As part of his right to due process, a criminal defendant has the right not to be subjected to suggestive police identification procedures that create a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254 (1977); quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968).[3] Not all suggestive identification procedures, however, raise a constitutional issue. First, the challenged procedure must be "unnecessarily suggestive." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967). Moreover, even unnecessary suggestiveness in and of itself does not violate due process. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 382 (1972). "The primary evil to be avoided is a very substantial likelihood of irreparable misidentifi-

[3] Some five years before *Brathwaite*, in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972), the Supreme Court explained that the standard articulated in *Simmons*, "a very substantial likelihood of irreparable misidentification," was the "standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification," and that in determining "the admissibility of testimony concerning the out-of-court identification itself," the standard should be modified by deleting "irreparable." *Id.* at 198, 93 S. Ct. at 381. *Brathwaite* involved both testimony about a suggestive pretrial identification and an in-court identification. The issue presented in *Brathwaite*, however, as framed by the Court, concerned only the admissibility of pretrial identification evidence. 432 U.S. at 99, 97 S. Ct. at 2245. In light of *Biggers*'s discussion, it is somewhat puzzling that the *Brathwaite* Court, in analyzing the pretrial identification, applied the test from *Simmons*, complete with the "irreparable" modifier. In petitioner's case, both pretrial and in-court identifications are at stake.

cation." *Id.*, 93 S. Ct. at 381 (internal quotations omitted). Thus, the "central question" is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199, 93 S. Ct. at 382.

The first question, then, is whether the line-up that included petitioner was suggestive. It was. Petitioner was the only person in the lineup who was wearing a black leather coat. All the witnesses who viewed the lineup had noticed that the man who shot Charles Hill was wearing a black leather coat and reported this to the police at the time of the robbery. W-130, 182, 233; T2-214. Moreover, it appears from the witnesses' testimony at the Wade hearing that the coat was a decisive factor in their identifications. Vincent Cooke specifically mentioned that he remembered the coat. W-165. He explained that he found petitioner's eyes and face distinctive, but he also relied on the fact that petitioner "had on the same clothes" as the shooter in the bar. W-166. The hearing judge found that Cooke "made the identification from his eyes and round face as well as a black leather coat." W-258. As for Arthur Shiloh, although the hearing judge managed to elicit that his identification was based partly on petitioner's face and features, it is clear that the coat was a significant factor. Shiloh began by stating that "the black leather coat really set it off for me." W-147. Indeed, the hearing judge acknowledged in his findings, which are presumptively correct, 28 U.S.C. 2254(e)(1), that "Shiloh stated that he made his identification from the face, but it was the black leather coat that convinced him it was the defendant." W-258. Based on this record the lineup was suggestive.

I put aside for the moment the question whether the lineup was "unnecessarily suggestive" and the relevance of the fact that the eyewitness identification was not the

product of deliberate police misconduct. While I will return to this question at a later point, I first address the central issue whether the suggestively obtained identifications were otherwise admissible. The five factors specifically identified in *Biggers* and *Brathwaite* as being included among those relevant to the admissibility of suggestive identifications are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Brathwaite*, 432 U.S. at 114, 97 S. Ct. at 2253, citing *Biggers*, 409 U.S. at 199-200, 93 S. Ct. at 382. Thus, the admissibility determination begins with an analysis of those aspects of the challenged identifications.

Opportunity to View

The opportunities of the witnesses to observe the robbers in the Moulin Rouge may be divided into two periods, before and after the shooting. The pre-shooting period extends from the three strangers' appearance at the bar until the time one of them shot Charles Hill. Witness estimates of the length of this time period ranged from ten to thirty minutes. W-84, 160; T2-119, 173, 207. Arthur Shiloh described the lighting conditions in the bar as "pretty fair," W-83, and asserted that the lights were on and he could see. T2-64. Vincent Cooke, on the other hand, said that the lighting was "kind of dim." W-161. Apparently Cooke was wearing dark glasses at the time of the robberies. W-189.

After the shooting, Arthur Shiloh did not have any further opportunity to observe the shooter. At the *Wade* hearing, he explained that another man held a gun on him and that during this time he never looked over to see

what the shooter was doing. W-120-121. He stated flatly at the hearing that he only saw the shooter "when he was in the bar talking to Charlie." W-122. Vincent Cooke testified that he was able to see the shooter immediately after the shooting:

> He backed away from Charlie, Charlie fell to the floor. He backed away. And while the shot was fired, I mean I wasn't staring at him. Then I just turned to see, you know, what happened, seen him fall. I seen the gun in his hand, and then the other fellow that had the gun that was standing closer to us, he pulled the gun and told us to put our hands on the bar.

W-161-162.

Cooke said that he had another chance to observe the shooter, when, after the witnesses had been herded into the bathroom by the robbers, the shooter appeared at the bathroom door asking which key fit Winfred Moore's car. W-162. At trial, however, Moore denied that the shooter had ever come back to the bathroom. T2-215.

Degree of Attention

The witnesses' attentiveness may have been affected somewhat by their alcohol consumption. When the robbers arrived, Arthur Shiloh was working on his third scotch of the evening and Cooke was having his second. W-110, 189-190. At the *Wade* hearing, Shiloh described how he looked up from the football game, looked out the window, and saw three men approaching the Moulin Rouge. W-83. When the three strangers arrived, Shiloh "just glanced at them." W-83. He did observe their movements, however:

> One stood by the window as they was coming into the door. Two went to the bathroom. When the two

> came out of the bathroom, they stopped about the middle of the bar—not the middle of the bar, three quarters way . . . .

W-84.

Cooke also looked at the strangers when they entered and noticed that two walked to the bathroom at the back of the bar while one remained up front. W-157. He described his observations of the men after they returned from the bathroom:

> Everybody was looking at the foot ball game and I seen, I think [the shooter] went over to Charlie and said something. . . . I remember looking and glancing. There was no argument or nothing, you know. I thought it was about the foot ball game probably, because it looked like they were smiling. So I assumed that everything was all right and I forgot about it, you know, about the three guys, because I was busy talking to Shiloh and Winnie.

W-158-159.

At that point, Shiloh also lost interest in the three strangers, and whatever concerns their arrival caused apparently dissipated:

> [T]hey started talking to Charles Hill and they were looking at the football game. So, I didn't pay no attention and I kept on watching the football game. As I was talking to Vincent and they were all laughing and talking and watching the football game, and after that, I looked over again and they were talking again. I assumed they were speaking of the football game and I assumed he knew the fellows and after that, I relaxed and I was still watching.
>
> Next thing I know, pow!

W-84.

After the shooting, Shiloh never looked at the shooter at all. W-119-122. Cooke watched the shooter as he backed away from Charles Hill. W-161. Shortly afterwards, however, he was distracted by the second gunman's command to put his hands on the bar. W-162. Of course, after the shooting the killer was holding a gun. Moreover, the second gunman held up the witnesses. Experts have confirmed the rather obvious fact that if someone is brandishing a gun at you, your mind is likely to be focused on the gun and not on the facial features of the people involved. See *United States v. Burrous*, 934 F. Supp. 525, 527 (E.D.N.Y. 1996). Indeed, both Shiloh and Cooke misidentified a photograph of the person who held a gun on them. T2-141-146, 197-199, 271-275.

Accuracy of Prior Description

The record is silent regarding the accuracy or inaccuracy of Shiloh's and Cooke's descriptions of the shooter.

Level of Certainty

On this issue, Shiloh's identification speaks for itself. He viewed the lineup for two or three minutes, told Detective Martin that no one in the lineup looked familiar to him, and left the lineup room. W-140-141. Detective Martin testified that when Shiloh viewed the lineup for a second time, he identified petitioner as someone who "strongly resembles the person who shot Charles Hill," W-240, but Shiloh testified that he didn't think he had used the word "resemble": "I said number one is the man, that's what I said." W-147. Asked whether there was any doubt in his mind when he made his second identification, Shiloh testified:

> Everybody have a little doubt, but I said that was the man, O.K.

Q: But you weren't absolutely sure?

A: Not positive, but I said that was the man, really . . . face features of him the black leather coat, the same thing, the black leather coat really set if off for me.

W-147.

According to Detective Martin, "Vincent Cooke viewed the lineup and said number one. I said how sure are you of it. He said if it isn't him, it's nobody." W-220. Cooke's testimony about the lineup, however, was a bit more equivocal. Asked whether he was "absolutely sure" when he made the identification, he replied, "Well, after I picked him out, I was convinced." There follows this colloquy:

Q: You were convinced?

A: Yes.

Q: Was there some doubt left?

A: If I was convinced, there can't be any doubt left.

Q: So, you are saying you are absolutely sure.

A: After I pointed him out.

W-184-185.

Time Between Crime and Confrontation

Twenty days elapsed between the robbery at the Moulin Rouge and the lineup. While that does not create the sort of memory drain that occurs with the passage of years, neither is it an immediate post-crime identification.

Summing up the effect of these factors, then, it appears that the witnesses had an opportunity to view the robbers for some minutes before the crime, and were

somewhat attentive to them, at least initially. The witnesses had been drinking, however, and were distracted by the football game they were watching and their conversation with each other. Once the shooting took place, they had little opportunity to see the shooter's face and were immediately or quickly distracted by the second gunman. There is no evidence one way or the other regarding the accuracy of their subsequent descriptions of the shooter, and the time between the shooting and the confrontation was not long or short enough to be a significant ~~factor~~. Finally, and most important, one of the witnesses was so uncertain at the confrontation that he initially declined to make an identification and only did so after he learned that another person had picked someone out of the lineup as the shooter. Considering these factors alone, the identifications simply do not appear solid enough to outweigh "the corrupting effect of the suggestive identification itself," *Brathwaite*, 432 U.S. at 114, 97 S. Ct. at 2253, especially given that both witnesses acknowledged that the suggestive coat was a factor in their identifications.

The factors set out in *Brathwaite*, however, do not exhaust the possible ways in which identification evidence may prove to be reliable or unreliable. Indeed, the Supreme Court was careful to say that the factors to be considered "include" the ones named. *Brathwaite*, 432 U.S. at 114, 97 S. Ct. at 2253. In my view, another critical factor should be taken into account before an otherwise unassailable jury verdict is set aside in a collateral proceeding: the evidence or lack of evidence that the petitioner is guilty of the crime of which he has been convicted. This sixth factor goes to the heart of the Supreme Court cases that initially addressed the problem posed by eyewitness identifications. Those cases developed out of concerns that eyewitness identifications (by strangers) are not reliable, that juries could not be

trusted to evaluate the deficiencies of such apparently compelling evidence, and that the admission of suggestive identifications risked the ultimate injustice—the conviction of an innocent person. In short, the reason the Court involved itself in the first place with suggestively obtained identifications was the recognition that they were a "major factor contributing to the high incidence of miscarriage of justice." *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933 (1967), *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970 (1967) ("A conviction which rests on a mistaken identification is a gross miscarriage of justice.").

The historical backdrop against which these cases were decided need not be reviewed at length. Steven P. Grossman sums up the empirical evidence that precipitated the Court's regulation of eyewitness testimony:

> Observers of the American system of criminal trials have long been aware of the danger of wrongful convictions because of a witness' misidentification. Edward Borchard, in his 1932 book, *Convicting the Innocent*, detailed numerous cases of people, later shown to be innocent, being tried and convicted of crimes. After analyzing the causes of these mistaken convictions, Borchard concluded that misidentifications by victims were the prime cause of wrongful convictions. Judge Jerome Frank, some years later, undertook a similar investigation and arrived at the same conclusion. Although the possibility of erroneous convictions cannot be prevented, nothing is more fundamental to our system of justice than the need to minimize these tragedies.

"Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria," 11 Baltimore L. Rev. 53, 65 (1981). In *Wade*, Justice Brennan cited the Borchard and Frank studies as support for the

underlying assumption in the *Wade*, *Gilbert*, *Stovall* trilogy that "the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228, 87 S. Ct. at 1933.

If the reason for ousting the jury from its historic role of evaluating evidence is our concern with such miscarriages of justice, then surely other evidence that strongly persuades us that a defendant is guilty supports allowing the jury to consider a questionable identification. Conversely, the absence of corroborating evidence may be relevant in the ultimate determination of the admissibility of identification evidence. *See Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978) (noting that of "all the various kinds of evidence" testimony of eyewitnesses "is the least reliable, especially where unsupported by corroborating evidence").

In his James Madison Lecture on reasonable doubt, then-Chief Judge Newman argued that corroboration should be required in cases that rest on the testimony of a single eyewitness who "did not previously know the accused and had only a brief opportunity to observe him." Jon O. Newman, "The Madison Lecture: Beyond 'Reasonable Doubt'," 68 N.Y.U. L. Rev. 979, 999 (1993). Judge Newman suggested that, when corroboration is lacking, "courts should face up to their responsibilities and rule that, though there is some evidence of guilt, it is insufficient to persuade a reasonable jury by the high standard of proof beyond a reasonable doubt." *Id.* The rule he suggests may be problematic because it could preclude a jury from considering the only available relevant evidence. See Jerome Frank and Barbara Frank, *Not Guilty* 63 (1957) (A rule that would "[n]ever allow a single witness to give testimony, at the trial, identifying the accused, but always require that at least one other witness corroborate such testimony" has the "obvious weakness" that in a case where no one was pre-

sent but the perpetrator and his victim, "no criminal could be convicted if the victim could not, in court, testify as to the identity of the accused.") The fact that it may be too much to require corroboration for all identifications, however, does not mean that we should ignore its importance altogether. As both Judges Newman and Frank recognize, corroboration is a valid factor in establishing the reliability of eyewitness identifications.

The corroboration rule I suggest here for eyewitness identification testimony would not preclude a conviction based on uncorroborated eyewitness testimony. Instead, it would only bar the admission of uncorroborated identification testimony when the totality of circumstances indicated that there was a significant risk of misidentification. Where corroboration was present, the jury would be permitted to determine the weight to be accorded to an otherwise questionable identification that had been suggestively obtained. Such a rule shows appropriate deference to the judicial process of the states, and to the central role of the jury as the finder of fact. It is also consistent with the current practice of many courts, although that practice has not yet achieved recognition as a sixth factor in the admissibility analysis of identification evidence.

Most important, the proposed rule provides greater insurance against the conviction of an innocent person than a test that focuses exclusively on the *Biggers-Brathwaite* factors, which has been almost universally criticized as inadequate. *See* Charles A. Pulaski, "*Neil v. Biggers*: The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection," 26 Stan. L. Rev. 1097 (1974) (suggesting that the *Biggers* test is so easily satisfied that the due process protection it provides is probably no greater than what already existed before *Stovall*). The value of at least two of the factors—accu-

racy of the witness' prior description and certainty at the confrontation—has been seriously questioned. Based on empirical research into eyewitness identifications, these factors "assign too much predictive value to eyewitness confidence and also to witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies." Ronald P. Fisher, "Interviewing Victims and Witnesses of Crime," 1 Psychol. Pub. Pol'y & L. 732, 736 (1995).[4] Moreover, psychologists who study memory and perception agree that numerous other factors can affect a witness' ability to make an accurate identification, including the violence of the event witnessed, the presence of a weapon, and the witness' expectations based on cultural biases and past experience. David M. Shofi, "The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony," 13 Pace L. Rev 1101, 1105-07 (1994); Elizabeth F. Loftus, *Eyewitness Testimony* 31-51, 136-42 (1979). *See also*, Randolph N. Jonakait, "Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?" 52 U. Colo. L. Rev. 511 (1981); Gerald F. Uelmen, "Testing the Assumptions of *Neil v. Biggers*: An Experiment in Eyewitness Identification," 16 Crim. L. Bull. 358 (1980).

Rather than relying solely on the five specific factors outlined in *Brathwaite*, a sixth factor that looks to corroborating evidence of guilt provides an essential protection against the "gross miscarriage of justice" that can

---

[4] The Second Circuit recently acknowledged that criticism of the witness confidence factor "may indeed have been scientifically reliable," yet upheld the exclusion of expert testimony that would have brought it to the attention of the jury. *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (testimony based on scientifically reliable articles regarding weak relationship between certainty and accuracy of identification was properly excluded because it "would have confused the jury's assessment" of witness credibility).

result from "[a] conviction which rests on a mistaken identification." *Stovall*, 388 U.S. at 297, 87 S. Ct. at 1970. As one commentator has observed, the ultimate question of an identification's reliability—as with any piece of evidence—is dependent in part on the existence of corroborating proof that the defendant is the one who committed the crime:

> At root, the accuracy of the determination of identity in criminal cases depends on redundance. In most cases in which the identity of the criminal is in dispute there are multiple, independent sources of information pointing to a single suspect. Errors can occur in such cases . . . , but they are rare. When the identification depends on a single type of evidence, however, mistakes are much more likely.
>
> The redundance that counts is not between one eyewitness and another but between different types of evidence of identity.

Samuel R. Gross, "Loss of Innocence: Eyewitness Identification and Proof of Guilt," 16 J. Legal Studies 395, 432-33 (1987).

It is true that in *Brathwaite* itself there is language that can be read to oppose the use of other evidence of guilt to establish the reliability of eyewitness identifications. After analyzing the record in light of the five factors articulated in *Biggers*, Justice Blackmun concluded that "[t]hese indicators of [the witness's] ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself." *Brathwaite*, 432 U.S. at 116, 97 S. Ct. at 2254. Justice Blackmun then continued,

> Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was

> arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

Id. Justice Blackmun did not explain why the corroborating evidence played no role in the analysis in *Brathwaite*, nor did he say that such evidence could never play a role in the decision whether to admit eyewitness identifications.

Some explanation for the puzzling manner in which Justice Blackmun dealt with the issue of corroboration may be found in Judge Friendly's opinion for the Second Circuit in *Brathwaite*, which was reversed by the Supreme Court. Judge Friendly took a different view of the reliability of the eyewitness identification when weighed against the five *Biggers-Brathwaite* factors. At the time of Brathwaite, however, it was the clear rule in the Second Circuit that independent evidence corroborating an identification could provide the basis for admitting an otherwise questionable identification. *United States v. Reid*, 517 F.2d 953, 967 (2d Cir. 1975). Such evidence was present in *Brathwaite*, corroborating the blatantly suggestive eyewitness identification: An undercover police officer had purchased drugs from Brathwaite at an apartment, and there was other evidence linking the defendant to that same apartment. Judge Friendly concluded, however, that this evidence was not strong enough to sustain the admissibility of the eyewitness identification. As he explained,

> Perhaps the strongest bit of evidence to strengthen the identification was Brathwaite's arrest in the very apartment where the sale was made. But Brathwaite offered an explanation of this which was not implausible, although evidently not credited by the jury . . . .

Brathwaite v. Manson, 527 F.2d 363, 372 (2d Cir. 1976). These circumstances may explain Justice Blackmun's unwillingness to rely on the corroborating evidence other than to say, quite consistently with Judge Friendly's analysis, that it did not undermine the reliability of the identification in this case, although it did not enhance it. Of course, this is speculation. What is clear, however, is that the majority of the Supreme Court in *Brathwaite* did not expressly hold that the presence of corroboration could not be considered.

Perhaps recognizing that the Blackmun opinion in *Brathwaite* was ambiguous, Justice Stevens wrote a separate concurrence, which was not joined by any of the other six members of the *Brathwaite* majority. Justice Stevens first commended Justice Blackmun's opinion for avoiding what he characterized as "the pitfall" of considering other evidence of guilt. *Brathwaite*, 432 U.S. at 118, 97 S. Ct. at 2255 (Stevens, J., concurring). He then went on to expressly articulate the view that corroborating evidence should not "be considered to support the admissibility of eyewitness testimony when applying the criteria identified in *Neil v. Biggers*." 432 U.S. at 118 n.*, 97 S. Ct. at 2259 n.*. "Properly analyzed," he continued, "such facts would be relevant to a question whether error, if any, in admitting identification testimony was harmless." *Id.*

While the Stevens opinion clearly says what Justice Blackmun avoided saying, it fails to set out the reasons for the rule it advocates, and seems somewhat inconsistent with the view expressed earlier in the concurrence. There, Justice Stevens suggested that "the Federal constitution does not foreclose experimentation by the States in the development of . . . rules" to "minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony." *Brathwaite*, 432 U.S. at 117-18, 97 S. Ct. at 2254-55 (Stevens, J., concurring).

Surely, such experimentation could encompass a rule making the admissibility of questionable eyewitness identifications turn on corroborative evidence that suggests that the eyewitness identification is not mistaken and that the defendant is not innocent. Since the Supreme Court applies such a rule of corroboration to the admissibility of confessions—and for reasons similar to its concern about the reliability of eyewitness identifications—it seems improbable that the Court would disapprove such a rule for determining the admissibility of identification evidence.

Indeed, corroboration is recognized widely as a way to address concerns about the reliability of evidence. "The law views some witnesses and some forms of evidence with skepticism, and therefore often demands corroboration as a matter of fairness to the defendant." William Payson Richardson & Jerome Prince, *Prince, Richardson on Evidence*, § 3-207 at 111 (Richard T. Farrell ed., 11th ed. 1995). In federal courts, as noted above, corroboration is mandated for confessions and admissions, in a version of the old common law "corpus delicti" rule. *See Smith v. United States*, 348 U.S. 147, 152-54, 75 S. Ct. 194, 197-98 (1954); *Opper v. United States*, 348 U.S. 84, 91-93, 75 S. Ct. 158, 163-64 (1954). Corroboration of an informant's tip can provide the basis for reasonable suspicion to justify an investigatory seizure by police, *see Alabama v. White*, 496 U.S. 325, 331, 110 S. Ct. 2412, 2416 (1990), and it is also a relevant factor in the determination of probable cause based on an informant's tip. *Illinois v. Gates*, 462 U.S. 213, 237-44, 103 S. Ct. 2317, 2332-35 (1983); *Draper v. United States*, 358 U.S. 307, 310-13, 79 S. Ct. 329, 331-33 (1959). Similarly, Fed. R. Evid. 804(b)(3) requires a showing of corroboration before declarations against penal interest may be offered to exculpate the accused.

New York also requires corroborative evidence for both confessions, N.Y. Criminal Procedure Law § 60.50, and declarations against penal interest, *People v. Thomas*, 68 N.Y.2d 194, 197, 507 N.Y.S.[2d] 973, 975 (1987), as well as demanding corroboration for accomplice testimony, unsworn testimony of witnesses too young or too mentally deficient to understand the significance of an oath, and in prosecutions for certain offenses, including some sex offenses, perjury, criminal possession of stolen goods, and criminal facilitation. *Prince, Richardson* § 3-207(b)-(g) at 111-16. Numerous state statutes require corroboration before the hearsay statements of a child declarant may be admitted. *See Idaho v. Wright*, 497 U.S. 805, 829 n.2, 110 S. Ct. 3139, 3154 n.2 (1990) (Kennedy, J. dissenting). New York and other states likewise require corroboration before evidence is admissible under some common law exceptions to the hearsay rule. *See, e.g., People v. Brown*, 80 N.Y.2d 729, 735-36, 594 N.Y.S.2d 696, 700-01 (1993) (present sense impression).

Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139 (1990), does not undermine the propriety of the corroboration rule proposed here. In that case, a 5-4 majority held that particularized guarantees of trustworthiness required to establish the reliability of a child's hearsay statement of sexual abuse could not be satisfied by independent evidence establishing the truth of the hearsay declaration. *Id.* 497 U.S. at 822-23, 110 S. Ct. at 3150; *see also Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 1900-01 (1999). In *Wright*, however, the Supreme Court was applying the Confrontation Clause, a provision of the Constitution that prescribes a specific mechanism—confrontation and cross-examination—for testing the trustworthiness of testimonial evidence. *See Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 2539 (the "underlying purpose" of the Confrontation Clause is "to augment

accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence"). In that context, before admitting evidence without cross-examination, the circumstances under which the statements were made must be determined to be "so trustworthy that [such] adversarial testing would add little to their reliability." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3149. In contrast, the eyewitness identification cases involve a judicially created rule to prevent an unjust conviction. While the rule may be rooted in the Due Process Clause, it is not a specifically prescribed rule that should preempt variations that are equally, or more, effective in achieving the same purpose. *Cf. Wade*, 388 U.S. at 239, 87 S. Ct. at 1938-39.

Moreover, there is a significant aspect of *Brathwaite* that provides affirmative support for a rule which takes other evidence of guilt into account in determining the admissibility of questionable eyewitness identifications. I refer to yet another concurring opinion, not by a Justice of the Supreme Court, but by Judge Harold Leventhal of the Court of Appeals for the D.C. Circuit, in *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir. 1968). The significance of the Leventhal concurrence in Clemons, which will presently be discussed, is that its reasoning was expressly adopted by Justice Blackmun in *Brathwaite*. The issue addressed by the D.C. Circuit in *Clemons* was the remedy to be employed in cases involving suggestive identifications that took place prior to *Stovall v. Denno*, 388 U.S. 218 [sic; 293], 87 S. Ct. 1926 [sic; 1967] (1967). By way of background, it may be recalled that *Stovall* asserted that the Due Process Clause could be offended by the admission of an unduly suggestive identification and was the first occasion on which the Supreme Court gave "notice that the suggestiveness of identification procedures was anything other

than a matter to be argued to the jury." *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382.

Oddly, *Brathwaite* involved the converse of *Clemons*—an unnecessarily suggestive identification after it was clear that such identifications implicated the Due Process Clause. Nevertheless, in rejecting a per se rule that would preclude the admissibility of eyewitness identifications that were preceded by such suggestive confrontations, Justice Blackmun cited Judge Leventhal's analysis as "correctly" describing the due process right articulated in *Stovall* "as protecting an evidentiary interest" and "as recognizing the limited extent of that interest in our adversary system." *Brathwaite*, 432 U.S. at 113, 97 S. Ct. at 2252.

In language quoted approvingly by Justice Blackmun in *Brathwaite*, Judge Leventhal wrote:

> In essence what the Stovall due process right protects is an evidentiary interest. . . .
>
> It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Clemons, 408 F.2d at 1251 (internal footnote omitted) (quoted in *Brathwaite*, 432 U.S. at 113 n.14, 97 S. Ct. at

2252 n.14). Judge Leventhal's opinion in Clemons goes on to explain:

> Since the interest protected is in essence an evidentiary one, denial of the retroactive right recognized in Stovall and explained in Simmons [v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968)] must depend on the assessment of all the factors bearing on the identification issue. The presence of other untainted identification testimony, counsel's opportunity to inquire into the circumstances of the challenged identification, and to bring out the facts, are all relevant to the consideration of overall due process fairness to the accused.

408 F.2d at 1251.

Most tellingly, immediately leading up to the section of *Clemons* quoted in *Brathwaite*, Judge Leventhal argued that it is

> appropriate—particularly in cases where the trial as well as the identification preceded Wade, Gilbert and Stovall—that the court assess not only the 'totality of circumstances' surrounding the challenged identification, but also the totality of circumstances at trial concerning the issue of identification, i.e. the totality of proof and other factors bearing on the likelihood of misidentification. The mere fact that some 'unreliable' identification testimony was received does not establish a denial of the due process right to a fair trial.

Id. at 1250. Judge Leventhal's opinion then sets out the rationale for broadening the due process inquiry to include the "totality of proof":

> The soundness of making a due process right depend on a review of evidence becomes clear when one focuses on the interests protected retroactively

> by the Simmons-Stovall due process right. Unlike the interests preserved by the guarantee of counsel or some of the other specific guarantees, the interests guarded by Stovall cannot so easily be factored out and assessed independently of the evidence.

Id. at 1251 (internal footnote omitted).

The cases since *Brathwaite* continue to reflect the reality recognized by Judge Leventhal that "the interests guarded by Stovall cannot so easily be factored out and assessed independently of the evidence." Thus many courts have continued to consider other proof of guilt in deciding whether to admit eyewitness identification testimony. As the Eighth Circuit put it, "it seems unnatural to set such evidence aside when one considers that the ultimate purpose of the *Biggers* factors is to avoid eyewitness testimony where there is 'a very substantial likelihood of irreparable misidentification'." *Graham v. Solem*, 728 F.2d 1533, 1546 (8th Cir. 1984) (en banc).

Several courts have explicitly analyzed other evidence of guilt to decide the admissibility of challenged identifications. A First Circuit case authored by then-Judge Breyer relied in part on corroborative evidence of guilt in holding that an eyewitness identification was properly admitted. *United States v. Lau*, 828 F.2d 871, 875 (1987).[5]

[5] The identification issue in *Lau* arose not as a due process challenge to eyewitness identification of the defendants as perpetrators of the crimes with which they were charged in that case, but as a question of whether a witness who claimed to have worked with them on a previous smuggling job should be allowed to testify. The probativeness of that testimony depended, of course, on the reliability of that witness's ability to identify the defendants as the men with whom he had worked. The different context seems unimportant, then, given the fact that the ultimate question—reliability of the identification evidence—was the same, and that in determining that it was sufficiently reliable, the First Circuit must certainly be understood to have held that its admission did not violate the defendants' due process rights.

The corroboration in that case included evidence that one defendant had a license to fly the type of plane used in the crime and another was nearby at the time of the incident. Judge Breyer went through the *Biggers-Brathwaite* factors for and against a correct identification—the witness's confidence in his identifications, opportunity to observe, accuracy of prior descriptions, and the time elapsed between the incident and the identification. *Id.* The corroborating evidence appears as part of this same analysis, as one of the "factors [that] weigh in favor of a correct identification." *Id.*

Similarly, in evaluating the reliability of eyewitness identifications in a drive-by shooting, the Seventh Circuit explained that "[c]orroborated eyewitness testimony is much less suspect than one individual's visual impression." *United States ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1156 (7th Cir. 1987). The Seventh Circuit then proceeded to consider, along with the *Biggers-Brathwaite* factors, that a car like the one eyewitnesses described was registered to the defendant, that two other witnesses who did not make identifications gave descriptions of the driver that fit the defendant, and that the shooting took place in the defendant's neighborhood. *Id.* at 1156-57, 1161. An in-court identification was likewise judged reliable by the Eighth Circuit, in part because two other government witnesses identified the defendant, including the driver of the getaway car. *United States v. Rogers*, 73 F.3d 774, 778 (8th Cir. 1996). As the panel explained, the "additional testimony diminishes any likelihood of irreparable misidentification." *Id.*; *see also United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996) ("Courts may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification").[6]

[6] It is true that some courts have read the *Brathwaite* language to preclude using other evidence of guilt in determining the admissibility of identification testimony. *United States v. Rogers*, 126 F.3d

So far as I know, there is no case overturning what was clearly the Second Circuit's rule before *Brathwaite*, that "other evidence connecting a defendant with the crime may be considered" to determine an identification's reliability. *Reid*, 517 F.2d at 967; *United States ex rel. Springle v. Follette*, 435 F.2d 1380, 1384 (2d Cir. 1970). One Second Circuit case, upholding the admission of identification testimony, includes Brathwaite's equivocal language in dictum disclaiming reliance on the use of other evidence of guilt. *United States v. Sanchez*, 603 F.2d 381, 386 n.6 (2d Cir. 1979). Nonetheless, a subsequent Second Circuit holding relies on corroborative evidence and provides more substantial guidance on this issue. *Sims v. Sullivan*, 867 F.2d 142 (2d Cir. 1989). That case involved the plainly suggestive identification procedure presented in almost every eyewitness identification case—the in-court identification. Upholding a conviction that involved such an identification against a habeas challenge, Judge Winter explained that "where the pretrial identification procedures were proper *and the other evidence of the defendant's guilt was ample*, no deprivation of due process exists." *Id.* at 145 (emphasis added). *Sims* strongly supports a general rule including corroborative evidence in the reliability analysis of suggestive identifications.

655, 659 (5th Cir. 1997); *United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995); *Green v. Loggins*, 614 F.2d 219, 225 (9th Cir. 1980). All of these cases cite Justice Stevens's*B rathwaite* concurrence. In at least two of the circuits with holdings rejecting the use of other evidence, however, the language of *Brathwaite* has engendered confusion, and there appears to be no settled rule about the use of corroborative evidence in determining whether a suggestive identification was properly admitted. *Compare Emanuele*, 51 F.3d at 1128, *with Reese v. Fulcomer*, 946 F.2d 247, 259 (3d Cir. 1991), *and Government of the Virgin Islands v. Riley*, 973 F.2d 224, 228 (3d Cir. 1992); *and compare Rogers*, 126 F.3d at 659, *with Cronnon v. State of Alabama*, 587 F.2d 246, 250 (5th Cir. 1979).

The petitioner in *Sims* was identified at his trial by a witness who had previously picked the petitioner out of a photo array with some uncertainty. Sims's request for a lineup prior to the in-court identification was denied. Holding that the in-court identification was not so unreliable as to "constitute a denial of fundamental fairness," Judge Winter found that it had not been tainted by any suggestive pretrial procedures. *Id.* As a result, under Second Circuit precedents, he was not obligated to address the independent reliability of the in-court identification. *Id.* But, significantly for the analysis here, the panel nevertheless considered whether the failure to grant a lineup resulted in an in-court identification that was "so unreliable that 'a very substantial likelihood of irreparable misidentification exists.' " *Id.* (quoting *Brathwaite*, 432 U.S. at 116, 97 S. Ct. at 2254 (internal quotation omitted)). In other words, the Second Circuit treated the in-court identification as a separate, suggestively obtained, identification.

In analyzing the reliability of this apparently fairly typical—and, thus, highly suggestive—in-court identification of the accused at the defense table, *Sims* held that a federal court is "not bound in a collateral attack upon a state court conviction to view an in-court identification in isolation from the rest of the evidence." *Id.* at 146. Judge Winter went on to explain that "the validity of an in-court identification, and, conversely the need for a lineup, will . . . vary according to the strength and nature of the other evidence against a defendant." *Id.* An accomplice had directly implicated Sims in the charged acts, and another witness had testified that the petitioner had admitted the crime. *Id.* Thus the in-court identification was "less crucial" then it would have been in isolation. *Id.*

It is quite apparent that the analysis in *Sims* was not a harmless error inquiry. As noted, the opinion states

expressly that "other evidence of the defendant's guilt" is relevant to the initial question whether a "deprivation of due process exists" as the result of a suggestive identification. *Id.* at 145.[7] Because the pretrial identification in *Sims* was treated as a separate suggestive identification, there is no logical reason to diverge from the reliability analysis in Sims when determining the admissibility of any suggestively obtained identification testimony, particularly in the habeas context.

Moreover, in the present case, there is an additional factor that weighs in favor of considering petitioner's admission in evaluating the reliability of the identification evidence. When Judge Leventhal wrote that "the interest guarded by *Stovall* cannot so easily be factored out and assessed independently of the evidence," *Clemons*, 408 F.2d at 1251, he did so in the context of a retroactive application of the rule against admitting unreliable identification testimony. Thus the identification procedures that were challenged had been conducted before the police were alerted to the due process ramifications of any suggestive aspects of those procedures. The present case is analogous.

We have here a confrontation that was never intended to produce an identification of the person the witnesses confronted. The state hearing judge found that, at the time of the lineup, petitioner was not viewed by the police as a suspect. He was put into the line as a filler, without any notion that he might be recognized as the shooter. Thus the confrontation that led to petitioner's identification was not a deliberate effort by the police to obtain

---

[7] Note also that after asserting that in a habeas proceeding the court need not view the identification in isolation from the other evidence Judge Winter inserted a "*cf.*" citation to *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir. 1984) (modified on other grounds, 756 F.2d 223 (2d Cir. 1984)), which applied harmless error analysis.

an identification of petitioner. Under the circumstances, the police understandably might have assumed there was no need to take precautions to prevent its suggestiveness. Indeed, any attempts to minimize suggestiveness were properly directed at preventing the identification of the suspect around whom the lineup was organized.

There is no question that wearing the coat was suggestive of petitioner's guilt. Still, the fact that petitioner's presence in the lineup was coincidental might amount to a good reason why the detective who arranged the lineup did not take care to minimize the suggestiveness that only became important after the fact. It is hard to say that when he failed to make petitioner take off his coat he created an identification procedure that was any more unnecessarily suggestive than the pre-*Stovall* cases to which Judge Leventhal referred.[8] It was

---

[8] *See Reese*, 946 F.2d at 261 (witness's inadvertent viewing of defendant while standing outside courtroom was not "impermissibly suggestive"); *Stevens*, 935 F.2d at 1390 (doubtful that victims' "fortuitous discovery" of attacker on wanted board "resulted from an unnecessarily suggestive identification procedure. Wanted boards, by nature, are composed of disparate photographs and sketches. . . . Recognizing this inherent limitation . . . although wanted boards are often suggestive, they are not 'unnecessarily' so"); *United States v. Domina*, 784 F.2d 1361, 1370 (9th Cir. 1986) (witness's viewing of defendant outside courtroom "was accidental and was not so suggestive as to require exclusion" of identification testimony or in-court identification); *Albert v. Montgomery*, 732 F.2d 865, 872 (11th Cir. 1984) (where state habeas court found that confrontation was "complete happenstance, unarranged by the police," the "brief, inadvertent encounter . . . was not impermissively suggestive"); *United States v. Clark*, 506 F.2d 416, 418 (5th Cir. 1975) (brief observation of defendant in handcuffs during court recess did not impermissibly taint identification testimony); *United States v. Famulari* , 447 F.2d 1377, 1380-81 (2d Cir. 1971) (witness's view of defendant at counsel table before entering court did not taint subsequent in-court identification, where viewing was no more suggestive than initial in-court indentification would have been).

certainly less so than the identification in *Sims*, which was ultimately sustained because of the corroborative evidence of guilt.

In order to trigger due process concerns, an identification procedure must be both suggestive *and* unnecessary. Even the most suggestive confrontation will produce admissible evidence, providing "there was some good reason for the failure to resort to less suggestive procedures." 1W ayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 7.4(b) at 581 (1984). In *Stovall*, the suspect was handcuffed to police officers when he was presented to the witness in her hospital room. As the Supreme Court commented in *Wade*, "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234, 87 S. Ct. at 1936. Nevertheless, the identification that resulted from that blatantly suggestive procedure was held admissible at trial because the Court judged that, under the circumstances, "an immediate hospital confrontation was imperative." 388 U.S. at 302, 87 S. Ct. at 1972. The Court adopted the justification given for the suggestive confrontation by the Court of Appeals—that the bedridden, and possibly dying, witness was the "only person in the world who could possibly exonerate Stovall," *id.*, although, as Judge Friendly later observed, it is hard to see "why if five police officers and prosecutors could have been assembled in her hospital room without danger to her health, one or two blacks could not have been found and allowed to accompany Stovall." *Brathwaite*, 527 F.2d at 370, n.12.

The situation in this case is quite different from that in *Stovall* and from the suggestive identifications taking place in courtrooms in almost every eyewitness identification case. The situation is also different from that in *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127

(1969), upon which petitioner relies. *Foster* involved deliberate and repeated suggestive confrontations, in one of which the defendant wore suggestive clothing. *Id.* at 441-42, 89 S. Ct. at 1128. Here, petitioner was intentionally included in the lineup as a filler. Yet there was no plan by the police to confront petitioner with witnesses in order to obtain an identification of him, let alone any attempt to obtain that identification by suggestion. Because petitioner happened to be in the precinct he was included in the lineup, and because he happened to be wearing his black leather coat he was identified as the shooter. Neither of the crucial circumstances that led to the identification—petitioner's participation in the lineup or what he was wearing—was deliberately orchestrated by the police to obtain an identification of petitioner.

The Supreme Court has never explicitly decided how such a lack of deliberate police action factors into the determination whether an identification procedure was unnecessarily suggestive. In one case, however, which also happened to involve suggestive apparel worn in a lineup, the Court seemed to indicate that the degree of police involvement in creating the suggestive circumstance was part of the inquiry. In *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970), the Court addressed a claim by a habeas petitioner that he had been unfairly singled out to wear a hat in a lineup, when all the other participants were bareheaded and one of the perpetrators had worn a hat. The Court gave two reasons for finding this due process claim meritless. It appeared from the record that the hat was not the basis of the identification; but the Court also took care to note that although the petitioner apparently was the only one in the lineup wearing a hat, "nothing in the record shows that he was required to do so" by the police. *Id.*, 399 U.S. at 6, 90 S. Ct. at 2002. *Cf. Wade*, 388 U.S. at 233, 89 [sic; 87]

S. Ct. at 1935 (listing among examples of suggestive procedures "that only the suspect was required to wear distinctive clothing which the culprit allegedly wore").[9] As in *Coleman*, there is nothing in the record here to indicate that petitioner was required by the detective to wear the black leather coat that turned out to be so suggestive to the witnesses.

It is true that since *Coleman*, the decisions in *Biggers* and *Brathwaite* have emphasized that the ultimate reliability of identification evidence is "the driving force," 432 U.S. at 111-12, 97 S. Ct. at 2251-52, of the Court's approach to identification cases, but the Court has continued to count deterrence of improper police procedures as one of the interests served by the exclusion of evidence based on unnecessarily suggestive identification procedures. *See Gonzalez v. Hammock*, 639 F.2d 844, 848 (2d Cir. 1980) ("There are two main reasons identification procedures have been suspect: first, the general problem of relying on eyewitness identification and second, the use of such procedures by overzealous police departments."). At the very least, as the Third Circuit

---

[9] Other cases on which petitioner relies stress that the defendants were required to wear a particular item by police intent on deliberately creating the suggestive confrontation. *See United States ex rel. Pierce v. Cannon*, 508 F.2d 197, 201 (7th Cir. 1974) (criticizing practice of "[r]equiring suspects to wear distinctive clothing during their participation in a lineup"); *United States ex rel. Cannon v. Montanye*, 486 F.2d 263, 266-67 (2d Cir. 1973) (where defendant was told by a police officer to wear a green sweater with full knowledge that the victims had described their assailant as wearing a green shirt, identification method might well have been unduly suggestive, particularly "in view of police complicity in arranging an unfair lineup"). See also *Willis v. Garrison*, 624 F.2d 491, 495 (4th Cir. 1980) (requiring suspects to put on clothing they discarded on the way to a confrontation shortly after the crime "is a far cry" from dressing suspects in incriminating clothing to influence identification).

observed in *Stevens*, the interest in deterrence would seem to apply with less force when an identification is not the product of a deliberate police action. 935 F.2d at 1390 n.11. Moreover, the Supreme Court has continued to emphasize that " 'a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it'." *Brathwaite*, 432 U.S. at 104, 97 S. Ct. at 2248 (quoting *Stovall*, 388 U.S. at 302, 87 S. Ct. at 1972). Certainly the fact that not only the suggestiveness of the confrontation with petitioner but the confrontation itself resulted from happenstance rather than design is a circumstance relevant to whether the resulting identification was *unnecessarily* suggestive. Under these circumstances, the presence of corroborating evidence should tip the scales in favor of allowing the jury to consider the eyewitness identification.

Gonzalez v. Hammock, 639 F.2d 844 (2d Cir. 1981), suggests as much. There the panel reversed a grant of habeas corpus where there "was no suggestion that the police had planned the so-called 'show up'." *Id.* at 846. A robbery victim who was being interviewed at the police station looked into an adjoining room and saw Gonzalez sitting with another robber whom the witness recognized. The witness spontaneously identified Gonzalez as the third of three men who had committed the robbery and fled in a car that was later stopped by the police. On the strength of that stationhouse identification and the description given by another victim, Gonzalez, rather than a fourth passenger in the car, was charged with the robbery. At trial, however, the witness was unable to identify Gonzalez.

Gonzalez challenged the admission of the stationhouse identification. In response, the Second Circuit cited *Brathwaite* for the central due process focus on reliability and analyzed the five *Biggers-Brathwaite* factors,

finding that they "clearly offset[ ] the possible corrupting effect of any inadvertent suggestiveness at the police station." *Id.* at 848. The analysis, however, did not end there. After noting that "banning use of this identification will not deter any kind of untoward police practice," consideration was given to the additional evidence of Gonzalez's guilt:

> Finally, as the Supreme Court has done, we must acknowledge other aspects of this case which, although peripheral, certainly do not detract from our decision. See Manson, 432 U.S. at 116, 97 S. Ct. 2243. These include the facts that a jury saw [the eyewitness] and heard his testimony and accepted his statements concerning the circumstances surrounding the identification, and the identification itself. More importantly, Gonzalez admitted being in the automobile which contained the robbers of the gas station. This was not the chance of picking Gonzalez out of millions of others, but rather the third robber was either Gonzalez or Rodriguez. Finally, [the other robbery victim] described the third robber as having dungarees, a white T-shirt and an Afro. Gonzalez was so dressed that night. [The other passenger in the getaway car] had on a dashiki and had short hair. Thus, *there was independent evidence bolstering the identification of Gonzalez.*

Id. (emphasis added). Thus, although characterizing it as "peripheral" out of deference to the elliptical language in *Brathwaite*, it is plain that the corroborating evidence was consequential, if not decisive.

In any event, there is no clear Supreme Court holding establishing that an accidentally suggestive identification may still violate due process. *Coleman v. Alabama* may suggest the contrary, even when corroboration is not present. A recent Second Circuit case, however, might

be read to support a rule that looks to suggestiveness, rather than its cause, to determine the admissibility of eyewitness identification evidence. *Dunnigan v. Keane*, 137 F.3d 117 (2d Cir.), cert. denied, [525 U.S. 840,] 119 S. Ct. 101 (1998), holds that an unnecessarily suggestive identification procedure arranged by a private citizen gets due process scrutiny. Arguably, *Dunnigan's* focus "on the fairness of the trial," *id.* at 128, rather than the identification procedure, would diminish the importance of the accidental nature of the suggestiveness in petitioner's case. For three reasons, however, the case is not controlling here. First, it involved a petition that was filed on August 10, 1994, *Dunnigan v. Keane*, 972 F. Supp. 709, 711 (N.D.N.Y. 1997), before the effective date of the act creating the requirement of a clear holding of the Supreme Court to justify relief. 28 U.S.C. § 2254(d)(1). More substantively, *Dunnigan* did not involve an accidentally suggestive identification procedure, and so did not consider the possibility that the identification produced was not "unnecessarily" suggestive. *Stovall*, 388 U.S. at 302, 87 S. Ct. at 1972. Finally, and most important, *Dunnigan* did not address the issue whether the identification there could be saved by compelling corroborative evidence of guilt.

There are three sources of corroboration in this case that together are sufficient to justify allowing the jury to decide the credence to be given to the eyewitness testimony. By far the most important is petitioner's confession, in which he admitted shooting Hill (although he offered an exonerating motive—Hill was starting to reach for a gun, T-701-702). Another piece of corroborating evidence is the same thing that created the suggestiveness in the lineup: petitioner's three-quarter-length black leather coat, which he was wearing twenty days after the robbery. This was apparently no run of the mill garment. Arthur Shiloh explained that it was out-

standing "because it wasn't no cheap coat." W-147. Vincent Cooke also emphasized that the coat was memorable. W-165. While the fact that petitioner was the only one in the lineup wearing such a coat made his identification suggestive, the fact that he had the coat a relatively short time after the robbery provides further corroboration of his guilt.

Moreover, in addition to the foregoing evidence, the record demonstrates that petitioner has a propensity not only to kill, but a preference for doing so with a bullet to the head. Sentencing Hearing of April 6, 1981 at 12. The murder of which he was convicted here was the first of four he committed within a twenty-day period. *Id.* While propensity evidence may not be admissible at trial because of "the danger that the jury may condemn the accused because of other criminal behavior, and not because of the evidence of guilt of the crime charged," *Prince, Richardson on Evidence* at § 4-501 at 175, this does not preclude giving such evidence some corroborative weight for present purposes.

Nor is the corroborating evidence necessarily the end of the discussion. The force of the corroborative evidence of guilt is hardly undermined by the absence of an alibi or any kind of a defense case. This is not a question of drawing an adverse inference from petitioner's failure to testify at trial or at the suppression hearing. Instead, it simply reflects the absence of the kind of evidence that would cause one to question whether the eyewitnesses identified the right man. *See United States v. Male Juvenile*, 121 F.3d 34, 42 (2d Cir. 1997) ("Rather than drawing an adverse inference, the district court was simply indicating that, by not testifying [at a suppression hearing], defendant had failed to contradict the government's evidence with his own testimony."). Indeed, the Leventhal concurring opinion quoted with approval in *Brathwaite* notes that a defendant can discredit an

eyewitness identification through "countervailing testimony such as alibi." *Clemons*, 408 F.2d at 1251 (quoted in *Brathwaite*, 432 U.S. at 113 n.14, 97 S. Ct. at 2252-53 n.14). Not only was such an alibi not offered, but neither petitioner nor his lawyer asserted his innocence, even at sentencing. While both challenged the quality of the eyewitness identifications, neither ever said, "They got the wrong man!" Indeed, the record here confirms that "Judge Friendly's observation a quarter of a century ago that 'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime' remains largely true today." *Schlup v. Delo*, 513 U.S. 298, 321-22, 115 S. Ct. 851, 864 (1995) (quoting Henry J. Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 145 (1970)).

In sum, if the "totality of the circumstances," *Brathwaite*, 432 U.S. at 121, 97 S. Ct. at 2256, includes "the totality of proof and other factors bearing on the likelihood of misidentification," *Clemons*, 408 F.2d at 1250 (Leventhal, concurring), the corroborating evidence here provides a good reason to find that the eyewitnesses identified the right man. Particularly in this unusual case, in which the suggestive identification procedure was inadvertent—and possibly not even unnecessarily suggestive—it would be bizarre to ignore such compelling evidence of guilt and grant the writ even though there is no reason for "concern about the injustice that results from the conviction of an innocent person [which] has long been at the core of our criminal justice system," *Schlup*, 513 U.S. at 324-25, 115 S. Ct. at 866, and which underlies the due process exclusionary rule at issue here.

This conclusion is unaffected by the fact that the jury did not hear the corroborating evidence provided by petitioner's confession and his predisposition to kill with a bullet to the head. The corroboration rule I apply here

is not a harmless error analysis. Instead, it is a review of a preliminary ruling on the admissibility of evidence. In general, the jury need not have all of the evidence that the trial judge had in making the preliminary ruling on admissibility. Fed. R. Evid. 104(a), *Bourjaily v. United States*, 483 U.S. 171, 178, 107 S. Ct. 2775, 2780 (1987); *see also United States v. Flores Perez*, 849 F.2d 1, 4 n.3 (1st Cir. 1988); *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985). The propriety of that rule in the context of an admissibility determination regarding identification testimony seems obvious when one considers its application to the *Biggers-Brathwaite* factors. In the ordinary course of things, a jury may be likely to hear much of the background evidence that makes up the five-factor test judges routinely apply. But ifs ome piece of proof regarding, say, a witness's opportunity to view the perpetrator or witness certainty, failed to come out at trial, no one would view its absence as a basis for appeal.

In this case, consideration of corroborative evidence that was not before the jury is also consistent with *Schlup v. Delo*, which held that, in considering whether a claim of actual innocence undermines the effect of a procedural forfeiture rule, "the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was excluded or unavailable at trial." 513 U.S. at 327-28, 115 S. Ct. at 867. While the context of the inquiry into guilt or innocence here is different than it was in *Schlup*, the basic inquiry is the same. Thus, the fact that the jury never heard petitioner's confession is irrelevant.

Nor does the fact that the corroborating confession was excluded under New York law from the trial that produced the conviction make its consideration improper in this collateral proceeding. The confession was not

obtained in violation of any United States constitutional standard, nor would it have been subject to exclusion under the Supreme Court's interpretation of the old common law "corpus delicti" rule that requires proof of the death of a homicide victim in a case where the accused confesses to the murder. *Wong Sun v. United States*, 371 U.S. 471, 491 n.15, 83 S. Ct. 407, 419 n.15 (1963).[10] While this rule has been expanded to require corroborative evidence implicating the accused where there is no corpus delicti, that is, no tangible injury, *Smith*, 348 U.S. at 154, 75 S. Ct. at 198, the more limited rule continues to apply to murder cases. The Supreme Court has made clear that, while "an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim," in such a case there need be "no link, outside the confession, between the injury and the accused who admits having inflicted it." *Wong Sun*, 371 U.S. at 491 n.15, 83 S. Ct. at 419 n.15. The New York confession rule is the same. N.Y. Criminal Procedure Law § 60.50; *Prince, Richardson*, § 3-207(a) at 111-12. Thus, in this case, under either the federal or state rule, the requisite corroboration for the confession—the dead body—was present, and the confession itself can be used to corroborate that petitioner was the killer. *See also United States v. Braverman*, 376 F.2d 249, 253 (2d Cir. 1967).

* * *

[10] That rule is not mandated by the Constitution and has been much criticized. Judge Learned Hand expressed doubt that there is "any substantial necessity in justice" for the rule requiring corroboration of confessions, and noted that "it seems never to have become rooted in England." *Daeche v. United States*, 250 F. 566, 571 (2d Cir. 1918). More recently, Judge Silberman has suggested that, "post-Miranda, the need for the rule, especially insofar as it protects against involuntary confessions, is even more questionable." *United States v. Dickerson*, 163 F.3d 639, 641 n.2 (D.C. Cir. 1999). See also, Thomas A. Mullen, "Rule Without Reason," 27 U.S.F.L. Rev. 385 (1993).

This opinion was substantially completed before the Supreme Court's decision last week in *Williams v. Taylor*, [529 U.S. 362,] 120 S. Ct. 1495, 2000 WL 385369 (April 18, 2000), which construed 28 U.S.C. § 2254(d)(1). That statutory section sets out the precondition that must be met before a writ of habeas corpus may be granted: The decision of the state court must be "contrary to, or involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *Williams v. Taylor* held that

> [u]nder the "contrary to" clause, a federal habeas court may [only] grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may [only] grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

[529 U.S. at 412-13, 120 S. Ct. at 1523,] 2000 WL 385369 at *28. Moreover, the Supreme Court emphasized that more than an erroneous ruling is required to make a state judge's decision "unreasonable."

Here, the state trial judge decided to admit the identification evidence on the ground that the lineup "wasn't for the purpose of identifying the defendant to begin with. It was for the purpose of attempting to identify someone else as the perpetrator." W-260. The Appellate Division affirmed this ground for the denial of the motion to suppress, although it also found that the eyewitness identifications had an "independent source." *Whitaker*, 428 N.Y.S.2d at 700. The ground relied on by

the trial judge for admitting the eyewitness identifications is not "contrary to," nor does it involve an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), even without considering the compelling corroborative evidence identifying petitioner as the murderer of Charles Hill. Thus, one aspect of the issue presented in this case—i.e., the accidental nature of the suggestiveness—may itself mandate a denial of the writ under § 2254(d)(1) as construed in *Willliams*. Because the New York courts did not consider the corroborating evidence in admitting the identification testimony, it may be inappropriate to rely on the deferential standard of review under § 2254(d)(1) in that aspect of my analysis. Such a deferential standard is not required, however, to support the due process admissibility analysis I apply. It is enough that there is no binding precedent that precludes it and much in the way of reason and caselaw to support it.[11]

---

[11] If the record contains a basis for rejecting a challenge to the validity of a judgment of conviction, a habeas court may rely on it even if it was not relied on by the state courts. *Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990) (affirming district court denial of habeas corpus relief, 737 F. Supp. 187 (E.D.N.Y. 1990), where district court denied the writ on grounds rejected by state courts).

Conclusion

The petition for a writ of habeas corpus is denied. Because of the open texture of the relevant precedents, petitioner has made a showing sufficient to justify granting a certificate of appealability. I grant that certificate with regard to the single issue presented in the petition.

SO ORDERED.

/s/ Edward R. Korman
Edward R. Korman
United States District Judge

Brooklyn, New York
April 28, 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

96-CV-3851 (ERK)

JEHAN ABDUR-RAHEEM,
formerly known as JOHN WHITAKER,
Petitioner,

—against—

WALTER KELLY, Superintendent,
Attica Correctional Facility,
Respondent.

MEMORANDUM

KORMAN, Chief Judge

On April 28, 2000, I filed a memorandum and order denying the petition for a writ of habeas corpus. Prior to filing the opinion, I had asked the parties to confirm the relationship of petitioner's sentences for his two jury-trial convictions and the sentences he received for the murder indictments to which he pled guilty. Because that information was not readily available, I filed the memorandum and order without awaiting it. The parties have now provided further documentation in the form of the minutes of a sentencing hearing, held on March 9, 1977, for the murders to which petitioner pled. That proceed-

ing followed petitioner's *first* trial conviction for the murder of Charles Hill. There, the judge indicated that, although he had initially imposed a sentence for the Hill murder that would run consecutive to the sentence of 25 years to life imposed on his previous jury trial conviction for the murder of Harriet Gathers, the Hill sentence should now be understood to run concurrent to all the other sentences. I wish to call the parties' attention, however, to the minutes of the sentencing held on April 6, 1981, after petitioner's *second* trial for the Hill murder. Exhibits Accompanying Petition for a Writ of Habeas Corpus, Vol. II, Ex. E, EDNY file doc # 55. At this second sentencing proceeding, petitioner was sentenced to a term of 25 years to life for the murder of Hill, "to be consecutive to the sentence imposed by Judge Barshay in Indictment Number 288 of 1976," *Id.* at 13 (attached), i.e., the Gathers sentence.

The sentencing minutes provided by the parties, however, indicate that the first sentencing judge, Justice Tsoucalas, believed that under New York law, "there is no such thing as a consecutive 25 years to life [sentence], since a man only has one life, and the 25 years minimum merged with each other, and the minimum is 25 years." Minutes of plea/sentencing March 9, 1977, p. 23. While the second sentencing judge clearly intended to impose a term of 25 years to life *consecutive* to petitioner's previous sentence for the Gathers murder, if Judge Tsoucalas's legal interpretation is correct, all petitioner's sentences run *concurrent* to one another. My purpose in filing this additional memorandum is to point out that, should that be the case, the concurrent sentence doctrine would provide an alternative ground for denying the petition. Indeed, until I came across the minutes of the second sentencing proceeding, I intended to make this discretionary doctrine an additional basis for my decision.

While the concurrent sentence doctrine is normally applied to avoid reaching the merits of one or more counts of a multicount indictment, the logic of the rule should extend to convictions on charges that were brought separately. See *United States v. Papadakis*, 510 F.2d 287, 299 (2d Cir. 1975) (considering, though deciding not to apply, concurrent sentence doctrine where defendant's claim of error concerned conviction whose 5-year sentence was "merely repetitive of the consecutive five year sentences of imprisonment he had previously been sentenced to by other judges under convictions which have long since become final"). Although it is usually applied on direct appeal, the reasons for the rule would extend to a collateral proceeding. See *Pinkney v. Keane*, 920 F.2d 1090, 1098-99 (2d Cir. 1990) (noting that habeas corpus application is "simply another stage in the same case," and citing 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2, at 387-88 (1988) in support of "the increased acceptance of the appellate analogy to federal habeas corpus"). Indeed, it has been suggested that there is "less objection to use of the doctrine in connection with a collateral attack on a conviction . . . as distinguished from a direct appeal." *United States ex rel. Weems v. Follette*, 414 F.2d 417, 419 (2d Cir. 1969), citing *Benton v. Maryland*, 395 U.S. 784, 793 n.11, 89 S. Ct. 2056, 2062 n.11 (1969).

Although the concurrent sentence doctrine remains viable, see *Barnes v. United States*, 412 U.S. 837, 848 n.16, 93 S. Ct. 2357, 2364 n.16 (1973), there is uncertain sympathy for the rule, principally because of concerns about the collateral consequences of a criminal conviction. See *United States v. Vargas*, 615 F.2d 952, 959 (2d Cir. 1980). Here, however, petitioner stands convicted of three other murders, all accomplished within 20 days of the killing of Hill. If his sentence for the Hill murder

were to run concurrent to the other sentences he received, his conviction in this case would add nothing significant to the consequences that flow from his other convictions.

Brooklyn, New York
June 5, 2000

/s/ Edward R. Korman
Edward R. Korman
United States District Judge

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JOHN WHITAKER,

Appellant.

June 9, 1980

Barry Gene Rhodes for appellant.
Eugene Gold, District Attorney (Peter Weinstein of counsel), for respondent.

OPINION OF THE COURT

TITONE, J.

In *People v Rogers* (48 NY2d 167 [decided Oct. 23, 1979]), the Court of Appeals held that once an attorney has entered a criminal proceeding, thereby signifying that the police should cease questioning, a defendant may not be further interrogated in the absence of counsel even when the interrogation concerns matters unre-

lated to the charge for which he is already represented by counsel. The principal question presented on appeal is whether the rule enunciated in Rogers should be applied retroactively or only prospectively. Appellant's judgment of conviction for the crimes of murder in the second degree, three counts of robbery in the first degree, and criminal possession of a weapon in the second degree, was rendered on February 28, 1977, after a jury verdict, or almost 32 months prior to the Court of Appeals determination in *People v Rogers (supra)*. I conclude that the determination of the Court of Appeals in *Rogers* applies even though the trial and judgment of conviction of appellant antedate such determination. Accordingly, the judgment must be reversed and the case remitted for a new trial.

In the early evening of January 4, 1976, Charles Hill, a correction officer and part owner of the Moulin Rouge Bar in Brooklyn, was seated near the middle of the bar. At about 6:05 p.m. three strangers entered the establishment. One of them, a man dressed in a three-quarter length dark leather jacket, struck up a conversation with Hill. Approximately 15 to 25 minutes later, a shot rang out. The patrons, all turning toward the sound, saw Hill appear to rise from his barstool, gasp, fall first into the arms of the stranger in the dark leather jacket, and then fall to the floor dead. They also noticed that the stranger had a gun in his hands. The three intruders proceeded to hold the other occupants of the bar at gunpoint and take money from the cash register, and money and personal property from the patrons. Shortly thereafter the three escaped in the Cadillac of one of the patrons.

Early in the investigation of the murder of Hill and the robbery at the bar, a police officer received confidential information that one Lindsay Webb had fired the fatal shot at Hill. Webb was arrested on the morning of January 24, 1976 and brought to the police precinct. It was

then decided by Detective Anthony Martin to hold a lineup in which Webb would be included. Three of the eyewitnesses to the shooting, Shiloh, Cooke, and Dukes, would be asked at the lineup if they could identify the person who killed Hill.

However, Martin encountered some difficulty in finding police officers who resembled Webb to participate in the lineup. As a result he arranged with two other detectives to use two prisoners they had in custody as standins at the lineup. One of the prisoners was appellant, John Whitaker, who had been arrested for the murder of one Harriet Gathers.

Dukes, Shiloh and Cooke viewed the lineup. The first two could make no identification. However, Cooke, to the surprise of the police officers present, identified Whitaker, not Webb, as the one who shot Hill. Then Shiloh, without speaking to Cooke, asked to view the lineup again. He was permitted to do so. On the second viewing Shiloh also selected appellant as the one who committed the homicide. At the trial both Cooke and Shiloh again identified appellant as the perpetrator.

Between January 24, 1976, the date the lineup was held, and February 24, 1976, appellant, under arrest for the Gathers homicide, made two telephone calls to Detective Clarence Crabb, his arresting officer. Each time appellant urgently asked Crabb to see him. Appellant expressed annoyance that Crabb had helped "put my tail in the soup" by extracting a statement from him relating to the Gathers homicide.

On February 24, Crabb responded to appellant's request to speak to him by meeting him in the ninth floor pens in the criminal court building during luncheon recess. Crabb refused to discuss the Gathers case with appellant ostensibly because the latter was represented by counsel and already under indictment in that case. However, Crabb described the events of the Hill homi-

cide, advised appellant of his rights, and asked him if he wished to discuss it. Appellant confessed to having killed Hill notwithstanding that Crabb warned him six times that he was making no promises in return for the confession. After the Huntley hearing was concluded, the court found that appellant was not represented by an attorney in connection with the instant case when he made the confession and that it was voluntarily given. Accordingly, the trial court denied appellant's motion to suppress it. After the trial the jury found appellant guilty of murder in the second degree, three counts of robbery in the first degree and criminal possession of a weapon in the second degree.

From the factual recitation above, it is manifest that the eliciting of a confession by Detective Crabb from appellant at a time when he was represented by counsel in an unrelated criminal case, is encompassed within the four corners of the rule enunciated in *Rogers* (48 NY2d 167, *supra*) proscribing such mode of police action. Speaking for the majority in *Rogers*, Chief Judge COOKE clearly, unequivocally and succinctly held (p 173): "Our acknowledgment of an accused's right to the presence of counsel, *even when the interrogation concerns unrelated matters*, represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State. An attorney is charged with protecting the rights of his client and *it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge* * * * Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence." (Emphasis supplied.)

Having determined that the police interrogation in *Rogers (supra)* was improper, the Chief Judge then

turned to the question of whether defendant's inculpatory statement was admissible as a spontaneously volunteered statement within the purview of *People v Hobson* (39 NY2d 479, 483). In the opinion of the Chief Judge (p 174), in order for an accused's statement "[t]o fit within this narrow exception, the 'spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed' ", citing *People v Maerling* (46 NY2d 289, 302-303).

In the instant case Detective Crabb knew and for that matter told appellant, that he could not speak to the latter regarding the Gathers case for which appellant was already under indictment and represented by counsel. He could have either told appellant as much over the telephone or simply refrained from making any response to appellant's requests to visit him. Instead, Crabb visited appellant in his cell and once there used the Gathers case as a pretext to encourage appellant to discuss the Hill homicide with him face to face. I consider it significant that neither Crabb nor appellant ever mentioned the Hill homicide during their two telephone conversations which led up to their meeting in one of the pens located in the courthouse, and that Crabb admittedly obtained specific approval from his superior officers and an Assistant District Attorney to speak to appellant about the Hill homicide at any ensuing meeting. Accordingly, under both the circumstances and the aegis of the *Rogers* case (48 NY2d 167, *supra*), the police interrogation herein was clearly improper and the confession stemming therefrom was not admissible in evidence as a "spontaneously volunteered statement."

Before delving into the labyrinth of appellate court determinations pertaining to retroactive or prospective application of decisions in landmark criminal cases involving the constitutional rights of the accused to

counsel, I believe it is essential that I briefly discuss the Court of Appeals pronouncements culminating in *Rogers (supra)*, with respect to the questioning of an accused in custody in the absence of his attorney.

In *People v Arthur* (22 NY2d 325, 329) the Court of Appeals, in reversing defendant's conviction for attempted murder in the second degree and ordering a new trial, enunciated the broad rule that "[o]nce an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel".

However, such seemingly broad mandate was narrowed in scope by the same court in *People v Taylor* (27 NY2d 327). In *Taylor*, defendants were represented by assigned counsel for a robbery for which they were being held in custody. During their incarceration, law enforcement officers, after advising defendants of their rights under *Miranda*, questioned them about another crime (murder) and succeeded in obtaining inculpatory statements from them, all in the absence of their attorneys.

In upholding the First Department's denial of their motion to suppress the inculpatory statements, the Court of Appeals held, *inter alia*, that (1) inasmuch as no criminal proceeding had been commenced against defendants for the crime of murder at the time of questioning, their inculpatory statements were not inadmissible, and (2) it was of no consequence that the law enforcement officials knew that attorneys had been assigned at the arraignment on the robbery charge since the attorneys were in no way connected with the instant proceeding (see, also, *People v Hetherington*, 27 NY2d 242).

The exception as to unrelated charges articulated in *Taylor (supra)* was accorded due recognition by the Court of Appeals in dictum as late as May 4, 1976 in

People v Hobson (39 NY2d 479, 483, *supra*). However, as conceded by Chief Judge Cooke in *Rogers* (48 NY2d 167, 171, *supra*), since *Hobson* it has been difficult "to define the precise reach of the limitation concerning unrelated charges." For instance, in *People v Ramos* (40 NY2d 610, 616), a majority of the members of this State's highest court held that the exception entitling the prosecution to question an accused in custody about an unrelated charge in the absence of counsel, did not bestow upon the prosecution the right to "ignore an affirmative act or statement on the part of an attorney, communicated in open court to the prosecution, indicating that the attorney has undertaken to represent the accused with respect to the second, unrelated crime."

In similar vein our highest State tribunal in *People v Carl* (46 NY2d 806, 807-808) held that the fact that police officers questioned defendant without counsel being present about a crime other than the one for which he was being held and had been assigned counsel, was a technicality of little significance since both incidents involved burglaries or attempted burglaries at the same location, they occurred a little more than a week apart, the Grand Jury considered both charges together, and indicted the defendant for both incidents under the same indictment. Under such circumstances the charges were deemed to be sufficiently related.

In *People v Ermo* (47 NY2d 863), decided on June 12, 1979, just four months before it decided the *Rogers* case (*supra*), the Court of Appeals, in upholding by a 5 to 1 vote this court's suppression of defendant's statements, held that the police had exploited concededly impermissible questioning as to an assault charge for which defendant was represented by the Public Defender for the purpose of advancing their interrogation and eliciting inculpatory statements from defendant with respect

to a homicide for which he was neither charged nor represented by counsel.

Finally, the Court of Appeals candidly acknowledged in *Rogers (supra)* that the strictures it had imposed in the *Taylor* case (27 NY2d 327, *supra*) upon the expansive language employed in *Arthur* (22 NY2d 325, *supra*) had proved to be troublesome in application and had been eroded and refined by the subsequent determinations in the *Ramos, Carl* and *Ermo* cases (*supra*). As a result, *Taylor (supra)* and the limitations therein were rendered nugatory and the rule enunciated in *Arthur (supra)* should stand undiminished. Thus, by holding in *Rogers* (48 NY2d 167, *supra*) that the *Taylor* limitations are not viable, and a fortiori an accused's right to the presence of counsel even when the interrogation concerns matters unrelated to the charge in which he is already so represented, the Court of Appeals, in the 11 years and 4 months period, commencing with *Arthur (supra)* and culminating with *Rogers (supra)*, has traveled full circle.

Returning to the retroactive versus prospective issue pertaining to cases involving deprivations of constitutional due process rights under the Fourteenth Amendment, it should be noted that appellate courts both on the Federal and State level have found resolution of such questions to be at least as troublesome and perplexing as did the Court of Appeals in its efforts over the years "to define the precise reach of the limitation [enunciated in *Taylor*] concerning unrelated charges" (*People v Rogers, supra*, p 171). Indeed the majority of the members of the United States Supreme Court in *Linkletter v Walker* (381 US 618, 620), referred to "retrospectivity" as a question that "has become a most troublesome question in the administration of justice." It should be added at this point that despite the fact retroactivity has been discussed and passed upon in numerous Supreme Court

cases since *Linkletter (supra)*, the question remains troublesome and perplexing.

In his opinion in *People v Morales* (37 NY2d 262, 267-269), Judge FUCHSBERG concisely and thoroughly discussed the concept of "retroactivity" and the avenues and detours it has traversed in the constitutional due process area. He stated that under common law a case decided on direct appeal always received the benefit, or detriment, of any decisional law pronounced before its judgment became final. However, once a judgment became final, it was not affected by law freshly pronounced thereafter.

Judge FUCHSBERG then observed that building on such historic common-law doctrine, especially in cases involving deprivations of constitutional due process rights under the Fourteenth Amendment in criminal cases, the United States Supreme Court in the 1960's employed retroactivity in expanded and varied forms. For instance it enlarged upon the traditional application to permit attack on judgments of conviction which had long been final, such as in the areas of double jeopardy (*Ashe v Swenson*, 397 US 436), right to counsel (*McConnell v Rhay*, 393 US 2; *Arsenault v Massachusetts*, 393 US 5), and right to pretrial determination of voluntariness of confessions (*Jackson v Denno*, 378 US 368). In other situations the Supreme Court adhered to the old rule of applicability only to judgments still pending on direct appeal, such as where evidence was obtained in violation of *Mapp v Ohio* (367 US 643) (*Linkletter v Walker*, 381 US 618, *supra*), and where adverse comment was made on accused's failure to testify (*Tehan v Shott*, 382 US 406).

Judge FUCHSBERG noted (*People v Morales, supra*, p 268) that by contrast, in still other cases " 'retroactivity' took a prospective turn," reaching in some instances only (a) to cases as yet untried, such as exclu-

sion of women from juries (*Daniel v Louisiana*, 420 US 31), right to jury trial (*De Stefano v Woods*, 392 US 631), and police interrogation rules set forth in *Escobedo v Illinois* (378 US 478) and *Miranda v Arizona* (384 US 436); or (b) to cases where the commission of the crime involved was to take place after the newly pronounced law was handed down, for example, in unlawful searches incident to arrest (*Williams v United States*, 401 US 646), use of illegal wiretaps (*Desist v United States*, 394 US 244), and right to counsel at a lineup (*Stovall v Denno*, 388 US 293).

What is evident after reading the above cases involving retroactivity claims which the United States Supreme Court has passed upon, is the seeming lack of any solid foundation upon which a set of rules can be structured with any degree of permanence. As Judge FUCHSBERG cogently stated in *Morales* (*supra*, p 269): "Analysis of the Federal and State cases [in the retroactive area] does not * * * yield a set of definitive principles. 'Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved'."

Moreover, a comparative analysis of the Federal cases reveals not only an absence of "definitive principles" in this area, but also a lack of compatibility. For example, right to counsel decisions are among those which the Supreme Court has held to be most commonly deemed retroactive (*Arsenault v Massachusetts, supra; McConnell v Rhay, supra*), as have decisions with respect to the use of a coerced confession at trial (*cf. Tehan v Shott, supra*, pp 413-416). However, the same court has also held that the police interrogation rules set forth in *Escobedo* and *Miranda (supra)*, apply only to cases yet untried (*Johnson v New Jersey*, 384 US 719),

despite the fact that permeating both *Miranda* and *Escobedo (supra)*, especially *Escobedo*, are strong and explicit expressions supporting the fundamental and constitutional rights of an accused to consult with, and be effectively represented by, counsel; and also to be free from coercive or deceptive police actions designed to extract or elicit a confession or an incriminating statement. For example the following germane statements are found in *Escobedo* (378 US 478, 484-492, *supra*):

"In *Massiah v. United States*, 377 U.S. 201, this Court observed that 'a *Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."* ' * * *

"The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime' * * * Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so * * *

"It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' * * * *This argument, of course, cuts two ways. The fact that many*

*confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed * * * The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. * * **

"We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (Emphasis supplied.)

Likewise, *Miranda* contains the following very pertinent remarks (384 US 436, 461, 469, 471-472, *supra*):

"As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

"This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram v. United States*, 168 U.S. 532, 542 (1897), this Court held: 'In criminal trials, in the courts of the United States, *wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself."* ' * * *

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection *of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.* * * *

"In *Carnley v. Cochran*, 369 U.S. 506, 513 (1962), we stated: *'[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.* * * *

"The privilege against self-incrimination secured by the Constitution applies to all individuals. *The need for counsel in order to protect the privilege* exists for the indigent as well as the affluent." (Emphasis supplied.)

Notwithstanding its strong utterances in *Escobedo* (378 US 478, *supra*) and *Miranda (supra)*, the United States Supreme Court in *Johnson v New Jersey* (384 US 719, 729-730, *supra*) based its determination of prospectivity with respect to its pronouncements in *Miranda* and *Escobedo* on the premise that the prime purpose of the rulings in both cases was "to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice", and that they do not "encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." The Supreme Court in *Johnson (supra)* cited with approval its determination in *Tehan v Shott* (382 US 406, 415-416, *supra*) wherein it stated:

"[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' * * *

"The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial * * * because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent * * * The same can surely be said of the wrongful use of a coerced confession * * * *By contrast*, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." (Emphasis supplied.)

Thus the Supreme Court in *Johnson (supra)*, consistent with its dictum in *Tehan (supra)*, first examined, in isolation, the purposes of the Fifth Amendment privilege against compulsory self incrimination, and then opted for a prospective application of the rules set forth in *Escobedo (supra)* and *Miranda* (384 US 436, supra) instead of a retroactive one. What it did not do either in *Johnson* or *Tehan* was to recognize, as it did in *Miranda* and *Escobedo*, the close interrelationship of an accused's Fifth and Sixth Amendment rights in situations stemming from police interrogation of an accused in the absence of counsel.

In my opinion, it is extremely difficult (and perhaps impossible) to reconcile the thrust of the caveat in

Escobedo (*supra*, at p 492), "when the process [police interrogation] shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—*our adversary system begins to operate, and, under the circumstances here*, the *accused must be permitted to consult with his lawyer*", when read *in pari materia* with the pronouncement in *Arsenault v Massachusetts* (393 US 5, 6, *supra*) that the right to counsel at all other " '*critical' stages of the criminal proceedings* * * * *have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial'* " (emphasis supplied), with the contrasting and limiting statements in *Johnson v New Jersey* (384 US 719, 729-730, *supra*) that the rulings in *Miranda (supra)* and *Escobedo* (378 US 478, *supra*) should be administered prospectively because the purposes of such rulings were simply "to guarantee full effectuation of the privilege against self-incrimination," and merely to "guard against the possibility of unreliable statements in every instance of in-custody interrogation".

With respect to this case it may logically be argued that even under the prospective theory enunciated in *Johnson v New Jersey (supra)*, appellant may come within the ambit of, and benefit from, the rules set forth in *Escobedo (supra)* and *Miranda (supra)* concerning the right of an accused to have his attorney present during an in-custody police interrogation, since appellant's trial and ensuing conviction occurred many years after the Supreme Court decisions in those two cases. Although *Rogers* (48 NY2d 167, *supra*) was decided by the Court of Appeals after appellant's trial, the decision therein may very well be construed as one which simply and collaterally delineates the breadth and scope of the basic tenets enunciated in *Escobedo (supra)* and *Miranda (supra)*, but in no way alters or narrows such tenets or proscribes their application in cases tried before the

Rogers decision but still pending on appeal. Indeed, support for such construction may be drawn inferentially from the following sentence found in Chief Judge COOKE's opinion in *Rogers* (48 NY2d, at p 173): "*Our acknowledgment of an accused's right to the presence of counsel, even when the interrogation concerns unrelated matters, represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State.*" (Emphasis supplied.)

However, assuming the decision in *Rogers (supra)* is pivotal to the issue herein, I then conclude that *Rogers* should be applied (retroactively) to a case (such as this one) which was pending on appeal at the time the decision in *Rogers* was rendered. Implicit in *Rogers (supra)* is the conclusion that unless an accused has interposed a valid waiver, he is deemed to have been denied effective representation of counsel at a crucial stage of a criminal proceeding in a situation where, although represented by an attorney, he is subjected to an in-custody police interrogation without the attorney being present; and that it is immaterial whether or not the interrogation is related to the charge on which the attorney has been retained or assigned. "There can be no doubt that the right to assistance of counsel is an essential ingredient in our system of criminal jurisprudence, rooted deeply in our concept of a fair trial within the adversarial context. It is 'one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty' " (*People v Felder*, 47 NY2d 287, 295-296). The Court of Appeals "has jealously guarded the individual's privilege against self incrimination and right to counsel, demanding that these fundamental rights be accorded the highest degree of respect by those representing the State" (*People v Rogers, supra*, p 170). Right to counsel decisions are among those which have most

commonly been deemed retroactive (*People v Morales*, 37 NY2d 262, 270, *supra*). The constitutional right to the assistance of counsel applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation (*cf. Carnley v Cochran*, 369 US 506, 513). The right to counsel at trial, on appeal and at other critical stages of criminal proceedings have all been made retroactive since the denial of the right must almost invariably deny a fair trial (*cf. Arsenault v Massachusetts*, 393 US 5, 6, *supra*). The right to counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial (*People v Felder, supra*, p 296) *

In my opinion a limited retroactive application of *Rogers*, (48 NY2d 167, *supra*), i.e., the governing by it of other cases still pending as well as the parties to *Rogers* itself (cf. Ann. 10 ALR3d 1371, 1401-1403; *Jackson v Denno*, 378 US 368, *supra*; *People v Moll*, 22 AD2d 921), would not place an undue burden on the administration of justice. To date there appears to be no significant degree of reliance by law enforcement authorities in pending appeals on the pre-*Rogers* limitation enunciated in *People v Taylor* (27 NY2d 327, *supra*). This court is not dealing with the open-ended situation which occurs when there is a collateral attack on a final judgment (*People v Morales, supra*, p 270; cf. *Desist v United States*, 394 U.S. 244, 251, *supra*).

---

* In a recent decision, the Third Department also applied the rule in *Rogers* retroactively (*People v Albro*, 73 AD2d 73). Speaking for the entire Bench in *Albro*, although one Justice dissented on another issue, Presiding Justice MAHONEY stated, *inter alia* (pp 75-76): "We believe the *Rogers* rule *(supra)* should be given retroactive effect. The rule was fashioned to guard an individual's privilege against self incrimination and right to counsel. '[Right] to counsel decisions are among those which have most commonly been deemed retroactive' (*People v Morales, supra*, p 270)."

Moreover, the purpose served by *Rogers (supra)* is not so much as to quantify *in futuro* the protection extended to individuals against self incrimination but rather to reaffirm and clarify the fundamental right of an accused to be represented by counsel during an in-custody interrogation (cf. *Desist v United States, supra*). Furthermore, since in effect it was also held in *Rogers (supra)* that under the circumstances, defendant's inculpatory statement was not "spontaneously volunteered" but rather induced by the psychological coercive influence of police tactics, a challenge to an involuntary statement made under similar circumstances should be upheld in a case where the appeal from a conviction after trial was pending at the time *Rogers* was decided (cf. *Jackson v Denno*, 378 US 368, *supra; Gerberding v Tahash*, 387 US 91, revg 275 Minn 195).

With respect to appellant's claim that the identification of him at the lineup as the person who fatally shot Hill should be suppressed because he was compelled to participate in such proceeding, it should be noted that unlike the situation in *People v Vega* (51 AD2d 33), appellant was not a suspect at the time but was being used merely to "flesh out" the proceeding. Moreover, there is no evidence in the record to support a conclusion that the identification proceeding was not fairly conducted or that the identification of appellant as the perpetrator was suggestively induced. In fact, the purpose of using appellant, a nonsuspect, in the lineup, was to insure that the procedure would be as fair as possible (cf. *People v Blake*, 35 NY2d 331; see, also, Wall, Eye-Witness Identification in Criminal Cases, pp 57-58). I am also of the opinion that assuming the identification of appellant at the lineup should be suppressed because he was compelled to participate in it, the in-court identification of appellant had a sufficient independent origin.

Accordingly, the judgment of the trial court should be reversed, the confession suppressed, and the case remitted to the Supreme Court, Kings County, for a new trial.

HOPKINS, J.P., DAMIANI AND MANGANO, JJ., concur.

Judgment of the Supreme Court, Kings County, rendered February 28, 1977, reversed, on the law, defendant's confession is suppressed, and new trial ordered.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JOHN WHITAKER,

Appellant.

October 31, 1983

William E. Hellerstein (Claudia Van Wyk of counsel), for appellant.

Elizabeth Holtzman, District Attorney (Barbara D. Underwood, Peter A. Weinstein and Karen Lorentz of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County (Lentol, J.), rendered April 6, 1981, convicting him of murder in the second degree, robbery in the first degree (three counts) and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. Judgment modified, on the law, by deleting the provision providing that the

sentence imposed for murder in the second degree shall run consecutive to the sentences imposed for robbery in the first degree (three counts) and substituting therefor a provision that said sentences shall run concurrently. As so modified, judgment affirmed. It was improper for Criminal Term to impose consecutive sentences since the homicide and the robberies did not constitute separate or disparate acts (Penal Law, § 70.25, subd 2; *People v Underwood*, 52 NY2d 882). Rather, the testimony reveals that they were all part of the same criminal transaction (see *People v Braithwaite*, 96 AD2d 869). We have considered defendant's other points and find them to be without merit. Thompson, J.P., Brown, Rubin, and Boyers, JJ., concur.

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—v.—

JOHN WHITAKER,
Appellant.

Argued January 3, 1985; Decided February 14, 1985

Jonathan M. Kratter and William E. Hellerstein for appellant.

Elizabeth Holtzman, District Attorney (Peter A. Weinstein, Barbara D. Underwood and Richard T. Faughnan of counsel), for respondent.

OPINION OF THE COURT

Chief Judge WACHTLER.

The defendant, while lawfully in custody at a police station on a murder charge, was placed in a lineup relating to another murder, not because he was suspected of the crime but to fill up the lineup around another sus-

pect. At the lineup the defendant was identified as the person who committed this second murder and was subsequently convicted of the crime. He now appeals from an order of the Appellate Division affirming his conviction. His primary contention is that placing him in the lineup "as a filler" after his arrest on an unrelated charge, without his consent, violated his right to be free from unreasonable searches and seizures.

On January 4, 1976 three men committed an armed robbery at a Brooklyn bar. During the holdup one of the men shot and killed Charles Hill, a co-owner of the bar. On January 24 the police arrested Lindsay Webb in connection with the crime. At the station house the police decided to hold a lineup consisting of Webb and five police officers. However only three officers fitting Webb's description were available. At that point the police decided to use the defendant, John Whitaker, already in custody on an unrelated charge, as one of the "fillers" or "stand ins". The police did not seek the defendant's consent to participate in the lineup.

Two of the witnesses to the shooting separately viewed the lineup and identified the defendant, instead of Webb, as the man who shot Hill. Several days later the defendant waived his rights and admitted killing Hill.

Prior to trial the defendant moved to suppress his statements and the eyewitness identifications. With respect to the identifications the defendant urged that the lineup was suggestive, that he had been denied his right to counsel and that he should not have been placed in the lineup without his consent. The trial court denied the motions and the defendant was convicted after a jury trial.

On defendant's first appeal the Appellate Division set aside the conviction and ordered a new trial. The court held that his statements had been obtained in violation of

his right to counsel under the State Constitution and should not have been admitted at trial. The court found, however, that the identification of the defendant at the lineup should not be suppressed because he was compelled to participate in it. Distinguishing one of its earlier cases (*People v Vega*, 51 AD2d 33) the court noted that the defendant was not a suspect at the time but "was being used merely to 'flesh out' the proceeding", that he was placed in the lineup to make the procedure as fair as possible and that the lineup itself was not suggestive. The court also observed that the witnesses' identification of the defendant in court had a sufficient independent origin (75 AD2d 111, 125).

At the second trial the defendant was again convicted based on the eyewitness identifications. The Appellate Division affirmed his conviction.

On this appeal the defendant argues that the evidence of the lineup should be suppressed for a number of reasons. However, the only issue which is within the scope of our review is his contention that using him as a filler in a lineup without his consent constituted an illegal seizure.*

A person does not lose all 4th Amendment rights once he has been lawfully incarcerated. There are limitations on what the police may reasonably seize from a person being held on criminal charges. They may not, for instance, pump his stomach (*Rochin v California*, 342

* The defendant also contends that this conduct violates his due process rights by subjecting him to an increased risk of misidentification. This point, however, was not properly preserved at the trial where the only due process arguments the defendant raised related to the alleged suggestibility of the lineup and the failure to afford him counsel at the lineup. The latter issue is not raised on this appeal. The lower court's determination that the lineup was not suggestive involves a mixed question of law and fact which is supported by the record and thus is beyond review in this court (*People v McPherson*, 56 NY2d 696).

US 165) nor may they take a blood sample absent exigent circumstances (*Schmerber v California*, 384 US 757). On the other hand, no warrant is necessary to take fingerprints (*Davis v Mississippi*, 394 US 721, 727) or search a person lawfully in custody (*United States v Robinson*, 414 US 218).

It is also settled in other contexts that if the initial detention is lawful, no 4th Amendment violation occurs when a person is compelled to provide voice exemplars (*United States v Dionisio*, 410 US 1), handwriting samples (*United States v Mara*, 410 US 19) or participate in a lineup (*cf. United States v Crews*, 445 US 463). The individual can have no reasonable expectation of privacy in physical characteristics constantly exposed to the public (*United States v Dionisio, supra*, pp 11-15). In this case the defendant concedes that the initial detention was lawful but contends that the direction to appear in a lineup constituted an "additional intrusion" which cannot be justified by the initial detention since it does not relate to that crime.

Other jurisdictions considering the problem have generally found no violation of constitutional rights when a defendant held on one charge is placed in a lineup with respect to an unrelated charge (*People v Hodge*, 186 Col 189; *Rigney v Hendrick*, 355 F2d 710; *cf. United States v Sechrist*, 640 F2d 81 [fingerprints]; *but also see, United States v Perry*, 504 F2d 180 [practice questioned by certain members of the court]). The lower courts in this State have generally reached the same conclusion (*see, e.g., People v Smith*, 86 AD2d 251; *People v Pittman*, 83 AD2d 870; *People v Pickett*, 71 AD2d 575, *affd* 52 NY2d 892; *People v Vega, supra*). In those cases however, the police typically had probable cause or reason to suspect the defendant of the unrelated offense, although the legality of the initial arrest was often considered sufficient in itself to authorize the practice.

The defendant contends that a person lawfully held on one crime may not be placed in a lineup relating to another charge unless this "additional intrusion" is justified by additional proof establishing probable cause or reasonable suspicion that the defendant committed the separate crime for which the lineup is being held. If accepted, this argument would prohibit the common police practice of using detainees as fillers in station house lineups. In our view, however, the minimal "additional intrusion" on the defendant's lawful confinement which resulted from placing him in a lineup did not constitute an unreasonable seizure under the circumstances of this case.

The defendant cannot complain of his presence in the station house where the lineup took place. There is no contention that he had been arrested on a pretext to place him in a lineup with respect to unrelated offenses or that he was being unreasonably detained there for that purpose. It is undisputed that he was lawfully in custody at that place and time.

What he objects to apparently is the fact that he was required to stand at a particular spot in the station house during the lineup. Although he seems to recognize that a person in custody may be moved from one location to another for administrative convenience, he claims that this is not permitted when it is "unrelated to the prosecution and incarceration of a detainee". In our view the per se rule the defendant proposes overlooks the fact that reasonableness is the standard by which the legality of custodial conduct is to be judged. In making this determination the courts must balance the degree of intrusion on individual rights against the legitimate needs of law enforcement (*Camara v Municipal Ct.*, 387 US 523, 536-537).

The lineup is an essential part of the criminal justice system (*United States v Wade*, 388 US 218). The local

station house close to the scene of the crime may afford the best opportunity for prompt and reliable identification while witnesses are available and memories fresh. However, as this case illustrates, it is sometimes difficult to find suitable "stand ins" among those at or near the station house if persons being detained there are excluded. The use of detainees could lead to abuses, but in this case there is no evidence of harassment and the police conduct appears reasonable. Moving a person already in custody a short distance to a lineup and briefly placing him in it involves at best a minimal, and in our view constitutionally inconsequential, additional restraint. It also provides a reasonable solution to a problem which too often in the past has led to the showup which is a less desirable and potentially less reliable means of identification.

Accordingly, the order of the Appellate Division should be affirmed.

Judges JASEN, MEYER, SIMONS, KAYE and ALEXANDER concur.

Order affirmed.

JAN 18 PAGE 3

(2)

Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

No. 01-769

IN THE

Supreme Court of the United States

EDWARD R. DONNELLY,

Petitioner,

—v.—

JEHAN ABDUR RAHEEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CATHERINE M. SHARKEY
Counsel of Record
MAYER, BROWN & PLATT
1675 Broadway
New York, New York 10019
(212) 506-2697
Counsel for Respondent

26 pp

QUESTIONS PRESENTED

1. The petition presents the question whether a defendant is constitutionally entitled to rely on trial testimony to challenge a pretrial suppression ruling. However, as we explain in this brief, that question is not in fact presented by this case.

2. Whether the court of appeals applied an improper legal standard in rejecting the district court's affirmance of the state courts' holding that evidence of eyewitness identification from a suggestive lineup was nonetheless admissible because the lineup was only inadvertently suggestive.

RULE 14.1 STATEMENT

The parties in the Second Circuit were Jehan Abdur Raheem and Walter R. Kelly, Superintendent of Attica Correctional Facility. Edward R. Donnelly, Superintendent of Wende Correctional Facility, the state prison in which Mr. Raheem is presently incarcerated, has been substituted for Mr. Kelly as petitioner in this Court. Mr. Raheem is respondent in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

RULE 14.1 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

A. Factual Background 1

B. Proceedings Below 4

REASONS FOR DENYING THE PETITION 7

I. There Is No Reason For This Court To Address Whether, In A Federal Habeas Case, A Reviewing Court May Rely On Trial Testimony To Challenge A Pretrial Ruling Denying A Motion To Suppress Evidence 7

A. This Case Does Not Present An Appropriate Vehicle In Which To Address This Issue 7

1. The Second Circuit Did Not Hold That A Defendant Has A Constitutional Right To Rely On Trial Testimony When Challenging A Pretrial Suppression Ruling 7

2. Petitioner Did Not Raise This Issue Below ... 10

B. There Is No Conflict In The Lower Courts On This Issue 13

TABLE OF CONTENTS — Continued

Page

II. The Second Circuit Applied The Appropriate Standard Of Review Pursuant To 28 U.S.C. § 2254(d) 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases:

Armstrong v. *Young*,
34 F.3d 421 (7th Cir. 1994) 14

Banks v. *Rockwell Int'l N. Am. Aircraft Operations*,
855 F.2d 324 (6th Cir. 1988) 13

Cikora v. *Wainwright*,
661 F. Supp. 813 (S.D. Fla. 1987),
aff'd, 840 F.2d 893 (11th Cir. 1988) 14

Clark v. *Caspari*,
No. 00-1844, 2001 WL 1504718
(8th Cir. Mar. 15, 2001) 16-17

Dobbs v. *Kemp*,
790 F.2d 1499 (11th Cir. 1986) 14

Fagan v. *Washington*,
942 F.2d 1155 (7th Cir. 1991) 12

Glover v. *United States*,
531 U.S. 198 (2001) 13

Green v. *Loggins*,
614 F.2d 219 (9th Cir. 1980) 18

Holloway v. *Wolff*,
482 F.2d 110 (8th Cir. 1973) 14

Hunt v. *Cromartie*,
532 U.S. 234, 121 S. Ct. 1452 (2001) 8

TABLE OF AUTHORITIES — Continued

Page

Hunter v. *Allis-Chalmers Corp.*,
797 F.2d 1417 (7th Cir. 1986) 13

Lawrence v. *Armontrout*,
31 F.3d 662 (8th Cir. 1994) 12

Manson v. *Brathwaite*,
432 U.S. 98 (1977) 17

Mayo v. *Lynaugh*,
893 F.2d 683 (5th Cir. 1990) 12

Messer v. *Roberts*,
74 F.3d 1009 (10th Cir. 1996) 14

National Collegiate Athletic Ass'n v. *Smith*,
525 U.S. 459 (1999) 13

Neil v. *Biggers*,
409 U.S. 188 (1972) 5, 8, 9-10, 14-15, 17-18

Norton v. *Sam's Club*,
145 F.3d 114 (2d Cir. 1998) 12-13

Singleton v. *Wulff*,
428 U.S. 106 (1976) 12

Taylor v. *Freeland & Kronz*,
503 U.S. 638 (1992) 13

Thigpen v. *Cory*,
804 F.2d 893 (6th Cir. 1986) 18

TABLE OF AUTHORITIES — Continued

Page

United States v. *Restrepo*,
986 F.2d 1462 (2d Cir. 1993) 13

United States ex rel. Gibbs v. *Vincent*,
524 F.2d 634 (2d Cir. 1975) 14

Unites States ex rel. Hindi v. *Warden of McHenry County Jail*,
82 F. Supp.2d 879 (N.D. Ill. 2000) 12

Unites States v. *Wade*,
388 U.S. 218 (1967) 2-5, 8, 9-10, 11, 12, 18

Whitaker v. *New York*,
474 U.S. 830 (1985) 5

Williams v. *Shalala*,
997 F.2d 1494 (D.C. Cir. 1993) 13

Williams v. *Taylor*,
529 U.S. 362 (2000) 15, 16, 17

Statutes:

28 U.S.C. § 2254(d) ..... 1, 15-18 (*passim*)

§ 2254(d)(1) ..... 15-18 (*passim*)

§ 2254(e)(1) 2

BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner's first claim — whether the Second Circuit erred by relying on trial testimony to challenge a pretrial ruling denying a motion to suppress evidence — raises an issue that was neither presented to, nor addressed by, the Second Circuit. Moreover, petitioner purports to identify a conflict among the federal courts of appeals and state courts of last resort with respect to consideration of trial testimony in challenges to pretrial suppression rulings on *direct appeal*, which — even if it does exist — would not affect the Second Circuit's reversal of the district court's denial of respondent's federal habeas corpus petition.

Petitioner's second claim — whether the Second Circuit erred by failing to apply the appropriate standard of review — seeks pure error correction. Petitioner makes no attempt whatsoever to argue that there is any conflict among the circuits with respect to the Second Circuit's alleged failure to apply the § 2254(d) standard of review in this case. Accordingly, because this Court does not sit to issue advisory opinions nor to engage in error correction, the petition for certiorari should be denied.

STATEMENT

A. Factual Background

In January 1976, three men entered the Moulin Rouge bar in Brooklyn, New York. As the bar's patrons watched the Superbowl on television, one of the three men fatally shot Charles Hill. The three men then cleaned out the cash register, robbed several patrons, and fled the scene. When the police arrived several minutes later, the patrons described the shooter as a black male wearing a black leather jacket.

Three weeks later, the police conducted a lineup at the police station. At the time, the police suspected Lindsey Webb,

whom a confidential informant had identified as the gunman. Respondent Jehan Abdur Raheem was not a suspect at the time. Nevertheless, to fill out the lineup, the police inserted Raheem, who happened to be in custody on an unrelated charge. Critically, Raheem was the only member of the lineup wearing a black leather jacket. Three witnesses from the bar viewed the lineup. The bartender, Cecilia Dukes, could not identify any of the men as the shooter. The other two witnesses (two patrons, Arthur Shiloh and Vincent Cooke) identified Raheem, although Shiloh did so only after viewing the lineup a second time.

A month after the lineup, Detective Clarence Crabb interrogated Raheem. Although Raheem was represented by counsel on another matter, Detective Crabb did not inform Raheem's counsel of his intention to interrogate Raheem about the Hill murder. According to Detective Crabb's uncorroborated account of the ensuing interrogation, Raheem confessed to the Hill murder.

1. As the Second Circuit explicitly recognized, the essential facts were undisputed on appeal. Pet. App. 3a. The state trial judge made the following findings of fact, which, as the federal district court noted, are presumptively correct under 28 U.S.C. § 2254(e)(1):

- "Shiloh stated that he made his identification from the face, but it was the black leather coat that convinced him it was the defendant" (Pet. App. 53a (quoting pretrial suppression hearing conducted pursuant to *United States* v. *Wade*, 388 U.S. 218 (1967));
- Cooke "made the identification from his eyes and round face as well as a black leather coat" (*Ibid.* (quoting *Wade* hearing)).

And, as the Second Circuit remarked:

> [E]ven the state trial court, which declined to suppress the identifications by Cooke and Shiloh, found that Cooke "stated that he made the identification from [Raheem's] eyes and round face[] *as well as a black leather coat*," and that "Shiloh stated that he made his identification from the face, but *it was the black leather coat that convinced him it was the defendant*, the number one person, who was there at the time."

Id. at 27a (quoting *Wade* hearing testimony) (emphasis in original). "At trial, the identification testimony of Cook and Shiloh * * * was substantially the same as their testimony at the pretrial [*Wade*] hearings." *Id.* at 50a. Moreover, the factual underpinnings of the witnesses' testimony — whether pretrial or at trial — were not disputed issues addressed by either the federal district court or the Second Circuit, both of which determined that the lineup was suggestive.

2. Petitioner attempts to introduce one disputed "fact" before this Court, characterizing Raheem as "a man who confessed to the killing." Pet. 24; see also *id.* at 7. This is wholly inappropriate in light of the fact that the Second Circuit not only noted, consistent with the state appellate court's determination (Pet. App. 110a-112a), that the confession evidence was inadmissible (*id.* at 37a), but also cast substantial doubt on the confession as described by Detective Crabb:

> Crabb, the only witness to that conversation, did not call in a stenographer or another officer, did not ask Raheem to write out his confession, and did not ask Raheem to review or initial Crabb's notes.

Id. at 37a. Moreover, petitioner does not even attempt to explain the relevance of this alleged fact to the questions presented for review.[1]

B. Proceedings Below

Tellingly absent from the State's petition is a succinct summary of the issues actually raised before the state and federal courts. As a careful review of the actual state court factual findings and federal court legal determinations demonstrates, neither of the questions presented by the State merits this Court's review.

1. With respect to the pretrial lineup from which Cooke and Shiloh identified Raheem, the state hearing judge concluded:

- "[the lineup] wasn't for the purpose of identifying the defendant" (*Id.* at 50a (quoting *Wade* hearing)); and
- "there was no testimony whatsoever * * * where anybody suggested or made any undue suggestions to any of the persons who viewed the lineup" (*Ibid.*).

Accordingly, the state judge decided to admit the identification evidence on the ground that the lineup was not purposefully suggestive.

---

[1] The State's gratuitous averment to the supposed confession seems calculated to suggest that the granting of the habeas petition in this case would unleash an allegedly confessed murderer onto society. In fact, however, any such suggestion is not only inappropriate but demonstrably false because, as the Second Circuit's decision makes clear, "Raheem is serving concurrent prison terms of 25 years to life on the basis of other convictions as well[; thus] the judgment in this case does not require his release." Pet. App. 40a.

2. At trial, the State introduced the testimony of Shiloh and Cooke. In addition, Detective Crabb testified that Raheem had confessed to the crime. The jury convicted Raheem.

3. On appeal, the Appellate Division reversed the conviction, ruling that Detective Crabb's testimony was inadmissible because the alleged confession had been obtained in violation of Raheem's constitutional right to counsel. *Id.* at 110a-112a. The court, however, affirmed the denial of the motion to suppress the identification on the ground that the lineup was not purposefully suggestive. *Id.* at 112a ("there is no evidence in the record to support a conclusion that the identification proceeding was not fairly conducted or that the identification of appellant as the perpetrator was suggestively induced"). The court remanded the case for a new trial. *Id.* at 113a.

4. At the second trial, Shiloh and Cooke again testified that Raheem was the gunman. Again, the jury convicted Raheem.

5. On appeal, the Appellate Division affirmed the conviction without discussing the constitutionality of the lineup. *Id.* at 114a-115a.

6. The New York Court of Appeals, in turn, declined to review the suggestiveness issue. *Id.* at 118a n.*. This Court denied certiorari. *Whitaker* v. *New York*, 474 U.S. 830 (1985).

7. On federal habeas review, the district court first concluded that the lineup was unduly suggestive. Pet. App. 53a ("The first question, then, is whether the line-up that included [Raheem] was suggestive. It was."). The court then concluded that, under the five factors outlined in *Neil* v. *Biggers*, 409 U.S. 188 (1972), the identifications were not independently reliable. Pet. App. 59a. In reaching these conclusions, the district court relied on both *Wade* and trial testimony. *Id.* at 53a-59a; page 10, *infra*.

Nonetheless, the court ruled that these witness identifications — which resulted from an unconstitutionally suggestive line-up procedure — were admissible under a newly fashioned "corroboration rule"; namely, in this case, Raheem's guilt was corroborated by other evidence that was inadmissible or not introduced at trial. Pet. App. 83a-85a. Specifically, the district court relied on "three sources of corroboration": (i) Raheem's confession (that was deemed inadmissible by the state appellate court); (ii) the fact that Raheem possessed a black leather coat; and (iii) evidence that Raheem had committed other murders in a similar fashion. *Id.* at 83a-84a.

The district court ruled in the alternative that "[t]he ground relied on by the trial judge for admitting the eyewitness identification [*i.e.*, 'the accidental nature of the suggestiveness'] is not 'contrary to,' nor does it involve an 'unreasonable application' of 'clearly established Federal law, as determined by the Supreme Court.'" *Id.* at 88a-89a.

8. Raheem raised both of these grounds on appeal: (1) whether the district court's proposed corroboration rule was constitutionally infirm; and (2) whether the state courts' reliance on the fact that the improperly suggestive lineup was not assembled with any suspicion of Raheem constitutes a misapplication of federal constitutional law. *Id.* at 19a-20a.

The Second Circuit reversed the judgment of the district court on each ground. *Id.* at 19a-38a. The court, rejecting the district court's proposed "corroboration rule," held that a court's assessment of an identification's reliability may not include consideration of unrelated evidence corroborating the defendant's guilt. *Id.* at 34a ("Even if we viewed these [three] items [of corroborative evidence noted by the district court] as reliable evidence of guilt, we would decline to adopt such an analysis, which we believe confuses the due process inquiry with harmless-error analysis."). This was the key issue litigated

by the parties and decided by the Second Circuit. Yet in its petition before this Court, the State has not challenged the soundness of this ruling, even in the face of the Second Circuit's intimation that the Circuits may be divided on this question. *Id.* at 35a.

Instead, the State challenges only the Second Circuit's rejection of the district court's alternative holding that sustained, as not "contrary to" federal law, the state courts' legal determination that "the accidental nature of the suggestiveness" of the lineup would salvage an otherwise unconstitutionally suggestive lineup. On this issue of law, the Second Circuit rejected the district court's (and state courts') position; in so doing, the court relied on clearly established federal law that the unintentional nature of the assemblage of a suggestive lineup is immaterial to the appropriate due process analysis governing the exclusion of identifications that result from suggestive police procedures. *Id.* at 28a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO REASON FOR THIS COURT TO ADDRESS WHETHER, IN A FEDERAL HABEAS CASE, A REVIEWING COURT MAY RELY ON TRIAL TESTIMONY TO CHALLENGE A PRETRIAL RULING DENYING A MOTION TO SUPPRESS EVIDENCE.

A. This Case Does Not Present An Appropriate Vehicle In Which To Address This Issue.

1. The Second Circuit Did Not Hold That A Defendant Has A Constitutional Right To Rely On Trial Testimony When Challenging A Pretrial Suppression Ruling.

Petitioner asserts that the Second Circuit "*effectively held*" that a defendant is "constitutionally entitled" to rely on trial

testimony when challenging a pretrial suppression ruling. Pet. 11 (emphasis added). See also *id.* at 13 n.2 ("the Second Circuit's reliance on trial testimony as a basis for overturning the pretrial suppression ruling necessarily rests on a holding that consideration of that testimony is constitutionally required"). The Second Circuit did not make such a holding.

To begin, the Second Circuit found, *consistent with both the federal district court and the state hearing court findings* (see pages 2-3, 5, *supra*) that the lineup was suggestive. Pet. App. 25a ("as the district court found and as the description * * * of the record of the state-court proceedings demonstrates, the lineup in which Raheem appeared in his black leather coat was plainly suggestive to Cooke and Shiloh").[2] Moreover, and significant in light of the State's argument, both the Second Circuit's description of the state-court proceedings as well as its analysis of the lineup's suggestiveness rely almost exclusively on citations to the pretrial *Wade* hearing transcript. See Pet. App. 6a-9a; *id.* at 26a-27a.[3]

---

[2] It is long established that this Court will not lightly overturn concurrent findings of two lower federal courts (see *Hunt* v. *Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 1458-59 (2001)), and in particular consistent findings of lineup suggestiveness (see *Neil* v. *Biggers*, 409 U.S. 188, 193 n.3 (1972)). Therefore, as the case comes to this Court, it must be assumed that the lineup was constitutionally infirm.

[3] The few passing references to trial testimony are, for the most part, entirely redundant of the *Wade* testimony on the issue of the impact of the black leather coat on Cooke's and Shiloh's identifications, see, *e.g.*, Pet. App. 5a (quoting *Wade* hearing testimony with a "*see also*" reference to Second Trial Tr.); *id.* at 26a (same). Indeed, the only "standalone" references to trial testimony tend to support the *State's* position that Cooke and Shiloh relied upon factors other than the black leather coat in making their respective identifications. See *id.* at 5a (reference to Cooke's trial testimony that the shooter was

The State's contention before the Second Circuit was that the lineup was not suggestive because the goal was to present persons whose appearances were similar to that of Webb, the man whom the police had arrested as their suspect. See *id.* at 27a-28a; Brief of Appellee 31-32. The Second Circuit rejected this argument as "wide of the mark" (Pet. App. 28a), concluding that "[a]s to [Cooke and Shiloh], the appearance of Raheem as the only participant in the lineup wearing such a coat was unnecessarily suggestive" (*id.* at 28a-29a).

The State also urged the Second Circuit to adopt the district court's "corroboration rule." See *id.* at 34a; Brief of Appellee at 40-41. The court of appeals rejected the district court's new rule, concluding that "evidence of record that is unrelated to an identification but that is supportive of a finding of guilt is properly considered in harmless-error analysis, not in the due process inquiry of whether the identification has reliability." Pet. App. 36a. Thus, the Second Circuit concluded — without challenge by the State here — that the district judge had applied an erroneous legal standard in denying habeas relief and that there were no other legitimate grounds for denying that relief.

In making these two holdings, it was not necessary for the Second Circuit to rely on trial testimony. Indeed, petitioner has made no attempt to demonstrate that either of these holdings would be different absent any of the trial testimony citations.[4]

"medium size" and appeared to be in his 20s); *id.* at 26a (reference to Shiloh's trial testimony pointing to Raheem's "face and his black leather coat").

[4] In particular, to evaluate whether the identifications of Raheem by Cooke and Shiloh had reliability independent of the suggestive lineup, the Second Circuit evaluated the *Biggers* factors, relying on both *Wade* hearing testimony and trial testimony. Once again, for the most part, the court's references to trial testimony are interspersed among a far greater number of references to the *Wade* hearing

2. Petitioner Did Not Raise This Issue Below.

Significantly, the district court likewise relied on both *Wade* hearing and trial testimony — absent any objection on the part of the State — with respect to the fact that "[a]ll the witnesses noticed that the shooter was wearing a black leather coat, and gave that description to the police." *Id.* at 44a. The district court also cited trial testimony in its evaluation of the "opportunity to view"[2] (see *id.* at 54a-55a) and "degree of attention" factors (see *id.* at 57a). The district court concluded that "[c]onsidering these factors alone, the identifications simply do not appear solid enough to outweigh 'the corrupting effect of the suggestive identification itself,' especially given that both witnesses acknowledged that the suggestive coat was a factor in their identifications." *Id.* at 59a (citation omitted).

Although Raheem cited trial testimony in his habeas petition to the district court (see Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus 18-20 (July 31, 1996)), the State raised no objection to Raheem's

---

testimony. See, *e.g.*, Pet. App. 31a, 32a. With respect to two references to trial testimony in its consideration of the witnesses' opportunity to view the shooter (see Pet. 18), the State cannot argue any prejudice since the court concluded that "[t]he opportunity factor, on balance, seems to favor reliability." Pet. App. 30a. Indeed, the sole factor on which the court seemed to place any significant reliance on trial testimony was the witnesses' degree of attention. See *ibid.*

But even more significantly, it cannot be said that the Second Circuit relied exclusively or even definitively on any one of the *Biggers* factors. Rather, the court considered "the poor ratings of Cooke and Shiloh on *most* of the * * * *Biggers* factors" (*id.* at 33a (emphasis added)) along with "the totality of the circumstances" (*ibid.*) and, significantly, the undisputed fact that "both witnesses repeatedly cited the coat worn by Raheem as influential in their selection of him" (*ibid.*).

reliance on this testimony either in its written response (see Affidavit in Opposition to Petition for a Writ of Habeas Corpus (Nov. 13, 1996)) or during the September 18, 1997 hearing before the district judge (see 9/18/97 Habeas Tr.). Nor did the State object when, during a subsequent hearing on August 3, 1999, Raheem again specifically referred to trial testimony on the record to cast doubt on the validity of the pretrial identification testimony. See 8/03/99 Habeas Tr. 42-43. Nor did the State raise any objection to Raheem's reliance on trial testimony in his October 8, 1999 letter-brief to the district court.

Not only did the State not object to Raheem's reference to trial testimony before the district court, the State actually encouraged the district court to rely on trial testimony by repeatedly referring to such testimony itself, without asserting any kind of qualification.[5] The State also stood silent during the habeas hearing when Raheem's counsel agreed with the district judge that "[t]he district court obviously has the power * * * to expand the record on habeas." 11/07/99 Habeas Tr. 12.

In light of the State's repeated failure to object to Raheem's reliance on trial testimony in his habeas petition or during oral arguments during the various hearings, the State's charge that the Second Circuit's decision "has the paradoxical effect of allowing a federal court to overturn a state court's pretrial suppression ruling on a ground that, according to New York precedent, the state appellate courts were barred from considering" (Pet. 14) rings especially hollow. For even if New

---

[5] For example, the State specifically compiled a summary of the *Wade* hearing and trial testimony of both Shiloh and Cooke for the Court's consideration of the suggestiveness of the lineup procedure. See 9/18/97 Habeas Tr. 16. See also 11/07/99 Habeas Tr. 20-22 (State relies heavily on trial testimony in support of its opposition to Raheem's habeas petition).

York has a "well settled" procedural bar rule, precluding defendants who have not moved to reopen their suppression hearings from relying on trial testimony to challenge the suppression ruling, the State has waived any such alleged state procedural default rule. See, *e.g.*, *Lawrence* v. *Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994) ("[o]ur circuit has joined other circuits in holding that the State must raise procedural bar issues, or they are waived"); *Fagan* v. *Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991); *Mayo* v. *Lynaugh*, 893 F.2d 683, 686 (5th Cir. 1990); *United States ex rel. Hindi* v. *Warden of McHenry County Jail*, 82 F. Supp.2d 879, 883 (N.D. Ill. 2000). Moreover, unless the district court has addressed the issue of procedural default, the issue is not appealable. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

Perhaps in recognition of the fact that a litigant who fails to present an argument to the district court cannot rely on that argument in the court of appeals, the State did not press this issue before the Second Circuit. As the State concedes in a footnote of its petition to this Court, its sole reference to the issue of whether a defendant may rely on trial testimony to challenge a pretrial suppression ruling was contained in a footnote of its brief to the Second Circuit. See Pet. 18 n.3 (citing Brief of Appellee 35 n.4).[6] Such a footnote reference in an appellate brief is insufficient to preserve an argument for appeal. See *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir.

---

[6] The footnote reference, moreover, was limited to the single objection to the district court's crediting of a witness' trial testimony that none of the perpetrators came back to the bathroom, which was inconsistent with Cooke's *Wade* hearing testimony that he saw the gunman again at the bathroom door. See Brief of Appellee 35 n.4. As we discuss above (see pp. 9-10 n.4, *supra*), reliance upon this trial testimony, which is relevant to the "opportunity to view" factor, could not possibly have prejudiced the State, as the Second Circuit found in favor of the State on this factor.

1998) ("an argument made only in a footnote was inadequately raised for appellate review") (citation omitted); *United States* v. *Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (an argument that was initially presented only in a footnote of appellant's brief was inadequately raised for appellate review); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (rejecting appellant's attempts to raise an issue presented in a footnote of his brief). See also *Williams* v. *Shalala*, 997 F.2d 1494, 1501 (D.C. Cir. 1993) (refusing to rule on an issue referenced in a footnote but not ruled on by the district court); *Banks* v. *Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988) (refusing to review an argument that was not adequately presented in the district court).

* * *

This Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). See also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (citation omitted). Accordingly, the petition should be denied.

B. There Is No Conflict In The Lower Courts On This Issue.

There is no circuit conflict on the issue of using trial testimony to challenge a pretrial suppression ruling on federal habeas review. Even if the Second Circuit had addressed the issue — which, as we discuss above, it did not — its holding would not establish the circuit split alleged by petitioner, which focuses on courts' review of suppression rulings on *direct appeal*. See Pet. 11-13; see also *id.* at 16. Petitioner makes no attempt to explain its assertion that the Second Circuit's

"effective[]" holding in the habeas case before it pertains to claims "*either* on appeal *or* on federal habeas corpus review." *Id.* at 11 (emphasis added); see also *id.* at 15, 16.

In fact, the sole federal habeas review case cited by petitioner, *Holloway* v. *Wolff*, 482 F.2d 110 (8th Cir. 1973), is, as the petitioner acknowledges (see Pet. 12-13), in accord with the approach taken by the Second Circuit here. *Holloway* states explicitly that, in the federal habeas context, the court may consider trial evidence in determining whether the defendant's rights had been violated. 482 F.2d at 113 n.2. Indeed, typically the "record" reviewed on federal habeas includes such trial testimony, *irrespective* of whether the petitioner has made or renewed objections to the pretrial suppression hearing. See, *e.g.*, *Messer* v. *Roberts*, 74 F.3d 1009, 1017 (10th Cir. 1996) (relying on trial testimony in holding lineup identification was not necessarily suggestive); *Armstrong* v. *Young*, 34 F.3d 421, 428 (7th Cir. 1994) (relying on trial testimony to conclude that showup identifications of defendant by witness were reliable); *Dobbs* v. *Kemp*, 790 F.2d 1499, 1506 (11th Cir. 1986) (reviewing trial testimony to confirm reliability of identifications; petitioner made no objection at trial); *United States ex rel. Gibbs* v. *Vincent*, 524 F.2d 634, 638 (2d Cir. 1975) (court concluded "from the testimony at the suppression hearing and the testimony at the trial" that show-up identifications were not impermissibly suggestive; petitioner made no objection at trial). See also *Cikora* v. *Wainwright*, 661 F. Supp. 813, 817 (S.D. Fla. 1987) (relying on trial testimony of witnesses and the officer who showed the photo array to conclude identification was not impermissibly suggestive; petitioner's objection not renewed at trial), aff'd, 840 F.2d 893, 894-95 (11th Cir. 1988).

Consideration of trial testimony by the federal habeas court seems particularly appropriate in light of the fact that the *Biggers* test requires courts to look beyond the suggestiveness

of an identification to determine whether the identification was nonetheless independently reliable. Indeed, in *Biggers* itself, this Court considered trial testimony in applying its due process analysis and the five-factor test fashioned to establish independent reliability. See 409 U.S. at 193-200.

Petitioner has cited no authority to the contrary in the habeas context. Moreover, during the habeas proceedings before the district court (as discussed pages 10-11, *supra*), the State apparently acquiesced in the district court's reliance on trial testimony.

II. THE SECOND CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW PURSUANT TO 28 U.S.C. § 2254(d).

Petitioner's second question presented not only seeks pure error correction but also is not raised by the Second Circuit's actual decision.

1. With respect to the district court's "alternative holding" — the sole ground challenged by the State before this Court (see page 7, *supra*), the Second Circuit properly focused (as did the district court) on whether the state appellate court's determination that the identifications were admissible because the suggestive lineup was not purposeful was "contrary to" federal law as required by 28 U.S.C. § 2254(d)(1).[7]

The State argues instead that "the state court finding that the identifications were reliable did not involve an 'unreasonable

---

[7] Under § 2254(d)(1), a petitioner cannot obtain habeas corpus relief on a claim that the state courts have addressed on the merits unless the decision handed down by the last state court to consider the claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see *Williams* v. *Taylor*, 529 U.S. 362 (2000).

application' of federal law." Pet. 24.[8] But the Second Circuit did not review the state courts' factual findings (see pages 2-3, *supra*) as to the lineup identifications of Raheem. Rather, the Second Circuit addressed the purely legal issue: whether "the state courts' reliance on the fact that the lineup was not assembled with any suspicion of Raheem *constitutes a misapplication of federal constitutional law*." Pet. App. 20a (emphasis added). The Second Circuit expressly agreed with Raheem's contention that it did. See *id.* at 20a, 27a-29a.

2. The State's charge that the Second Circuit "completely ignored" (Pet. 19) and "failed to apply" (*id.* at 20) § 2254(d) is baseless. While the court of appeals did not explicitly invoke the "contrary to" language of 28 U.S.C. § 2254(d)(1), a finding in that regard is necessarily implicit in the court's agreement with Raheem's contention on appeal, which was explicit on this point.[9]

In any event, the State offers no authority for the proposition that a court of appeals must explicitly invoke 28 U.S.C. § 2254(d). Not only are there other case examples to the contrary (see, *e.g.*, *Clark* v. *Caspari*, No. 00-1844, 2001 WL 1504718, at *2 (8th Cir. Mar. 15, 2001) (applying § 2254(d) without expressly stating the standard of review applicable

---

[8] A state court decision is an "unreasonable application" of clearly established law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

[9] Raheem's argument that "[t]he state court ruling that the lineup did not violate due process because the police did not assemble it with the purpose of identifying petitioner is 'contrary to' clearly established federal law as determined by the Supreme Court" (Brief of Appellant at 54-57) focused explicitly on the proper application of 28 U.S.C. § 2254(d)(1).

thereunder)), but it would be a particularly odd requirement in a case, such as this, where neither side contested the standard's applicability.[10]

3. Moreover, the Second Circuit's decision that the state court's reliance on the inadvertence of the suggestiveness of the lineup constituted a misapplication of federal constitutional law (see Pet. App. 20a, 27a-29a) is plainly correct. A state court decision is "contrary to" clearly established law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams* v. *Taylor*, 529 U.S. 362, 413 (2000).

As the Second Circuit recognized, this Court has explicitly recognized that the "question of whether the police procedures constituted misconduct is not determinative of whether an identification was suggestive." Pet. App. 28a (citing *Manson* v. *Brathwaite*, 432 U.S. 98, 112-14 (1977)). Thus, the Second Circuit concluded that:

> [t]o the extent that the State means to emphasize that its assemblage of a lineup that was suggestive as to Raheem was unintentional, that argument is immaterial. The purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of mis-identification.

Pet. App. 28a. See *Biggers*, 409 U.S. at 198 ("it is the risk of misidentification created by a suggestive pretrial identification, not the deterrence of police misconduct, that undergirds the

---

[10] The State mentions that it argued in the Second Circuit that § 2254(d)(1) applied to the case (Pet. 20-21), but neglects to mention that Raheem did as well (see Brief of Appellant at 54-57).

exclusion of tainted identification testimony"); *Wade*, 388 U.S. at 229 ("[s]uggestion can be created intentionally or unintentionally in many subtle ways"). See also *Thigpen* v. *Cory*, 804 F.2d 893, 895-96 (6th Cir. 1986) (government misconduct irrelevant; "only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive"); *Green* v. *Loggins*, 614 F.2d 219, 222 (9th Cir. 1980) (an identification may prove unreliable, and therefore inadmissible, even though the identification "has not involved any culpable police conduct"). Petitioner has cited no authority that the state courts' reliance on the inadvertent suggestiveness of the lineup is not contrary to clearly established federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CATHERINE M. SHARKEY
Counsel of Record
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019
(212) 506-2697

JANUARY 2002

(3)

Supreme Court, U.S.
FILED
JAN 14
CLERK

No. 01-769

IN THE

Supreme Court of the United States

EDWARD R. DONNELLY, Superintendent of Wende Correctional Facility,

Petitioner,

—against—

JEHAN ABDUR RAHEEM, formerly known as John Whitaker,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
ANN BORDLEY
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

**Counsel of Record for the Petitioner*

January 14, 2002

1/99

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:	PAGE
Manson v. Brathwaite, 432 U.S. 98 (1977)	2
Neil v. Biggers, 409 U.S. 188 (1972)	2
Nelson v. Adams USA, Inc., 529 U.S. 460 (2000)	6
Schiro v. Farley, 510 U.S. 222 (1994)	6
United States v. Hicks, 978 F.2d 722 (D.C. Cir. 1992)	7
United States v. Longmire, 761 F.2d 411 (7th Cir. 1985)	7
United States v. Parra, 2 F.3d 1058 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993)	7

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for certiorari, the defendant mischaracterizes the findings of the state courts, the issues presented to and decided by the court below, and the issues presented in the petition for certiorari. The defendant ignores the state court finding that the identifications were independently reliable; ignores the State's arguments in the federal courts in defense of that state court finding; discounts the Second Circuit's decision overturning that finding; mischaracterizes the extent of the Second Circuit's reliance on trial testimony as a basis for overturning that finding; and ignores the issue, presented in the certiorari petition, of whether the Second Circuit applied an erroneous constitutional standard by relying on trial testimony to overturn the state court finding of independent reliability.

In addition, the defendant asserts that there is no conflict among the federal courts of appeals on the issue presented by the petition, but that assertion rests on a fundamental misinterpretation of the scope of the Second Circuit's decision in this case.

1. In describing the state court findings underlying the denial of the motion to suppress the identifications, the defendant refers only to the finding that the lineup was not suggestive, but completely ignores the alternative finding that the identifications were independently reliable (Brief in Opposition ["Br. Opp."] at 4 ¶ 1; at 5 ¶ 3). In fact, the state court decisions that the identifications were admissible rested on both of those alternative

grounds. First, both the trial court and the Appellate Division explicitly concluded that the lineup was not impermissibly suggestive (*see* Appendix ["App."] at 11a [quoting trial court's decision]; App. at 112a). Second, at the conclusion of the suppression hearing, at which both identifying witnesses testified about their opportunity to observe at the time of the shooting, the trial court found that the identifications were independently reliable, concluding that "each of the witnesses had ample time to view and notice the defendant's [sic] time of the occurrence" (Hearing tr. at 261); and on appeal, the Appellate Division explicitly found that the in-court identification had a "sufficient independent origin" (App. at 112a).

The defendant ignores that state court finding of independent reliability. But the issues presented in the certiorari petition concern the propriety of the legal standards employed by the Second Circuit in overturning that finding.

2. Without any basis at all, the defendant asserts that the district court's proposed corroboration rule, which would consider additional evidence of a defendant's guilt in assessing the reliability of an identification, was "the key issue litigated by the parties and decided by the Second Circuit" (Br. Opp. at 6-7). That assertion is incorrect. Rather, the State's brief to the Second Circuit was devoted primarily to the arguments that the lineup was not suggestive and that, in light of the factors enumerated in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), the identifications were independently reliable. Indeed, the discussion of those contentions occupied eighteen of the twenty-one pages in the argument section of the State's brief to the Second Circuit, while less than three pages at the end of the argument section addressed the district

court's corroboration rule. Similarly, the Second Circuit devoted a greater portion of its opinion to a discussion of whether the lineup was suggestive and whether the identifications were reliable in light of *Biggers* (App. at 21a-33a) than to a discussion of the district court's corroboration rule (App. at 34a-38a).

Thus, it is inaccurate to characterize the corroboration rule as "the key issue" in the Second Circuit. The issue regarding the state court finding of independent reliability received at least as much attention in the Second Circuit as the corroboration rule did, and it is the standard of review of the independent reliability finding that presents the issues on which the State is seeking certiorari.

3. The defendant blatantly mischaracterizes the issues presented in the petition for certiorari. The defendant asserts that the State challenges "only" the Second Circuit's rejection of the district court's holding regarding the inadvertence of any suggestiveness in the lineup, and that the Second Circuit's ruling on that issue is "the sole ground" challenged by the State in this Court (Br. Opp. at 7, 15). The defendant similarly limits one of the questions presented to the issue of inadvertent suggestiveness in the lineup (Br. Opp. at i [question 2]).

In fact, the petition for certiorari challenges the propriety of the legal standards employed by the Second Circuit in rejecting the state court finding that the identifications were independently reliable. The State argues in the petition that, by relying on trial testimony to attack the suppression ruling and by ignoring the deferential standard of habeas corpus review required by statute, the Second Circuit resolved the issue of independent reliability incorrectly (Pet. at 21-25).

4. The defendant attempts to minimize the extent to which the Second Circuit relied on trial testimony as a basis for overturning the finding of independent reliability, but the defendant does so by mischaracterizing the Second Circuit's decision in two ways.

First, the defendant asserts that, in the Second Circuit's evaluation of whether the identifications were independently reliable, "for the most part, the court's references to trial testimony are interspersed among a far greater number of references to the *Wade* hearing testimony" (Br. Opp. at 9 n.4). The defendant's assertion is demonstrably false. In the portion of the Second Circuit's opinion analyzing the issue of independent reliability of the identifications (App. at 29a-33a), the Second Circuit explicitly cited to testimony at the *Wade* hearing eleven times, but explicitly cited to testimony at the trials ten times. Moreover, in seven of those ten instances when the Second Circuit cited to trial testimony, the Second Circuit referred exclusively to trial testimony and did not refer to *Wade* hearing testimony to support the proposition for which the trial testimony was cited.

Second, the defendant entirely fails to address the Second Circuit's substantial reliance on the evidence that the witnesses made a photographic misidentification of the second gunman (*see* Pet. at 18, 24). That evidence was elicited only at the trials and not at the *Wade* hearing. But the Second Circuit's opinion referred to that evidence four separate times (App. at 5a, 30a-31a, 33a [twice]), three of which were during the court's analysis of independent reliability.

Thus, the Second Circuit's decision on the issue of independent reliability rests at least as much on trial testimony as it does on *Wade* hearing testimony. It is, of course, impossible to demonstrate with certainty that the

Second Circuit's resolution of the issue would have been different absent the reliance on trial testimony. But the Second Circuit's repeated references to trial testimony in its analysis of independent reliability presumably means that the court considered the trial testimony significant to its determination of that issue.

5. Contrary to the defendant's contention (Br. Opp. at 12-13), the issue of whether a defendant may rely on trial testimony as a basis to attack a pretrial suppression ruling was raised and resolved in the Second Circuit, and is therefore reviewable in this Court. In the State's brief to the Second Circuit, the State explicitly argued that "a defendant may not rely on trial testimony to challenge the correctness of the pretrial suppression ruling" (State's brief to Second Circuit at 35 n.4) (citing cases). In a reply brief, the defendant disputed that proposition, asserting that federal courts of appeals have ruled that "evidence adduced at trial may be considered in reviewing—not just affirming—a pre-trial suppression decision" (Defendant's reply brief to Second Circuit at 17 n.7) (citing cases). That issue was obviously decided by the Second Circuit, because that court repeatedly and explicitly cited trial testimony as a basis for its decision to overturn the suppression ruling.

The fact that the Second Circuit did not otherwise say that it was relying on trial testimony or explain its rationale for doing so does not preclude review of this issue by this Court. Nor, as the defendant suggests, is review precluded merely because the State advanced its contention on this issue in a footnote of the argument section of its brief rather than in the text. That footnote obviously put the defendant on notice of the argument, because the defendant responded to it in his reply brief. The State's argument, together with the defendant's response to that argument, fairly presented the issue to

the Second Circuit. Thus, the issue is reviewable by this Court.[1] *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70 (2000) (issue was reviewable by Supreme Court so long as court of appeals was "fairly put on notice" as to substance of issue).

6. The defendant contends that there is no conflict among the federal courts of appeals on the issue of whether, on federal habeas review, a state prisoner may rely on trial testimony to challenge a pretrial suppression ruling (Br. Opp. at 13-15). The defendant's contention is incorrect, and rests on two critical flaws in his reasoning.

First, the defendant notes that, in this case, the Second Circuit's reliance on trial testimony to overturn a pretrial suppression ruling arises in a federal habeas proceeding, whereas the court of appeals cases cited in the petition for certiorari, which hold that a defendant may not rely on trial testimony to attack a pretrial suppression ruling, arose on direct appeal. But the different procedural posture of the cases is inconsequential, and does not in any way detract from the circuit court conflict on this issue.

On federal habeas review, a state prisoner is entitled to relief only for a violation of federal law. Therefore, when, as in this case, a federal court grants a writ of habeas corpus by relying on trial testimony to overturn a state court's pretrial suppression ruling, the federal habeas court is necessarily holding that the state prisoner's ability to rely on trial testimony to attack the pre-

[1] Moreover, contrary to the defendant's contention (Br. Opp. at 12), the State was permitted, in the Second Circuit, to challenge the district court's reliance on trial testimony, even though the State had not done so in the district court. The district court denied the habeas petition, and thus the State, as the respondent in the Second Circuit, was "entitled to rely on any legal argument in support of the judgment below." *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citation omitted).

trial suppression ruling is a matter of constitutional entitlement. But when, as in the six court of appeals cases cited in the petition for certiorari (Pet. at 12), a federal court, on direct appeal, refuses to allow a defendant to rely on trial testimony to attack a pretrial suppression ruling, the federal court is necessarily holding that the defendant has no such constitutional entitlement. Thus, regardless of the difference in the proceeding in which the issue arises, the Second Circuit's decision in this case irreconcilably conflicts with six federal circuit courts on the issue of whether a criminal defendant is constitutionally entitled to rely on trial testimony to attack a pretrial suppression ruling.

The second flaw in the defendant's contention that there is no conflict on this issue arises from his failure to identify the distinction between reliance on trial testimony to *attack* a pretrial suppression ruling and reliance on trial testimony to *support* a pretrial suppression ruling. The defendant cites several decisions—including this Court's decision in *Biggers*—in which federal courts have relied on trial testimony to support a suppression ruling (Br. Opp. at 14-15), and the defendant apparently suggests that those decisions provide authority for the Second Circuit's decision in this case. But the holding of those decisions—that a reviewing court may rely on trial testimony to support a pretrial suppression ruling—is entirely different from the Second Circuit's holding in this case that a reviewing court may rely on trial testimony to overturn a pretrial suppression ruling. Indeed, at least three federal courts of appeals have expressly held that trial testimony may be relied upon to uphold a pretrial suppression ruling, but not to overturn it. *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Hicks*, 978 F.2d 722, 724-25 (D.C. Cir. 1992); *United States v. Longmire*, 761 F.2d 411, 418, 420-21 & n.6 (7th Cir.

1985). Thus, the decisions cited by the defendant provide no support for the Second Circuit's reliance on trial testimony to overturn a pretrial suppression ruling on habeas review.

CONCLUSION

On an important constitutional issue, the decision below is in conflict with other federal courts of appeals and with state courts of last resort. This Court should grant certiorari to resolve that conflict.

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
ANN BORDLEY
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

* *Counsel of Record for the Petitioner*

January 14, 2002